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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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May 21, 1976

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of New Jersey, entered on February 25, 1976, affirming the decision of the Superior Court of New Jersey, Law Division, Bergen County, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

Opinions Below

The decision and opinion of the Supreme Court of New Jersey is reported at 69 N.J. 253, 353 A.2d 514 (1976), and is set forth in Appendix A hereto at pages A1-A39. The decision and opinion of the Superior Court of New Jersey, Law Division, Bergen County, is reported at 134 N.J. Super. 124, 338 A.2d 833 (Super. Ct. 1975), and is set forth in Appendix A hereto at pages A40-A110.

Jurisdiction

Appellant initiated this action in the Superior Court of New Jersey, Law Division, Bergen County, pursuant to N.J.R.S. §§ 2A:16-50 *et seq.*, seeking a declaration that Chapter 25 of the Laws of New Jersey of 1974 contravened the Contract and Due Process Clauses of the United States and New Jersey Constitutions. Chapter 25 retroactively repealed that part of the New Jersey Legislation enacted in 1962 (N.J.R.S. § 32:1-35.55(b)) which had embodied a statutory covenant (the "1962 Covenant")* between the States of New Jersey and New York and with the holders of Consolidated Bonds of the Port Authority of New York and New Jersey (the "Port Authority"). The 1962 Covenant specifically limited the involvement of the Port Authority's revenues and reserves in the area of deficit rail mass transit.

After a trial in February 1975, narrowly limited to the issues of bondholder reliance on the 1962 Covenant and the extent of the damage to the secondary bond market caused by the repeal, the Superior Court entered an order on May

* Due to the bi-state nature of the Port Authority, valid action by both States was necessary to repeal retroactively the 1962 Covenant. On June 15, 1974, New York passed legislation similar to Chapter 25 (Ch. 993, Laws of New York of 1974).

14, 1975 dismissing Appellant's complaint and declaring that Chapter 25 was constitutionally valid. Appellant appealed that decision directly to the Supreme Court of New Jersey which, on February 25, 1976, affirmed the lower court's judgment, *per curiam*. The Notice of Appeal to this Court was timely filed in the Supreme Court of New Jersey on May 14, 1976.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2), this being an appeal from a final judgment of the Supreme Court of New Jersey, the highest court of that State, holding that Chapter 25 of the Laws of New Jersey of 1974 is not repugnant to Article I, Section 10, Clause 1 of, or the Fifth and Fourteenth Amendments to, the United States Constitution.

The Related Case. We call the Court's attention to the pendency of a related action, *United States Trust Company of New York* v. *The State of New York, et al.*, Index No. 09128/74, in the Supreme Court of New York, County of New York, instituted on June 17, 1974. The New York case attacks the validity of New York's repeal of the 1962 Covenant on the grounds that it violates the United States and New York Constitutions. If Appellant succeeds in the New York action, the 1962 Covenant will remain in force, since valid bi-state legislation is required for effective repeal. Thus a final judgment in Appellant's favor in a New York court, not appealed, or not appealable*, would end this case notwithstanding the New Jersey courts' approval of the repeal.

* Such a judgment, if decided upon the adequate and independent state ground that the repeal violated the Due Process Clause of the New York Constitution, would probably not be appealable to this Court, *e.g.*, *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965); *Herb* v. *Pitcairn*, 324 U.S. 117 (1945).

The pendency of the New York action does not affect the quality of the New Jersey Supreme Court's decision as a "final judgment . . . by the highest court of a state" under 28 U.S.C. § 1257(2).* It does not affect the power of this Court summarily to reverse the New Jersey Supreme Court's decision and thus finally settle the entire controversy, a course of action for which there are compelling arguments.

This Court, on the other hand, could decide in its discretion to note probable jurisdiction in this case and defer consideration on the merits pending final disposition of the New York case. It is not unknown, of course, for this Court to hold a case as to which it has noted probable jurisdiction on its docket pending further proceedings elsewhere. See *Metlakatla Indian Community, Annette Island Reserve* v. *Egan,* 363 U.S. 555 (1960) (involving "highest court of a state" segment of Section 1257. Similar deferrals have occurred when this Court's original or *certiorari* jurisdiction has been invoked. See, *e.g., Arkansas* v. *Texas,* 346 U.S. 368 (1953) (original jurisdiction), and, as to *certiorari,* the cases discussed in R. Stern & E. Gressman, *Supreme Court Practice* § 5.9, at p. 219 (4th ed. 1969).

The arguments for a noting of probable jurisdiction and subsequent deferral are two-fold:

> 1. If the New York court declares the New York repeal legislation repugnant to the New York Constitution, that decision is probably not appealable to this Court, since there would be an "adequate and independent state ground" for it. *E.g., Jankovich* v. *Indiana Toll Road Comm'n,* 379 U.S. 487 (1965); *Herb* v. *Pitcairn,* 324 U.S. 117 (1945). Since valid bi-state legislation is necessary for repeal, it would then not be necessary for this Court to decide the case at bar.
>
> 2. If the New York court declares the New York repeal legislation constitutional, or unconstitutional because repugnant to the United States Constitution, this Court will then be in a position to decide the entire controversy having had the benefit of the New York courts' consideration of the factual issues.

* *E.g., Largent* v. *Texas,* 318 U.S. 418 (1943), and *Bandini Petroleum Co.* v. *Superior Court,* 284 U.S. 8 (1931), which held that the possibility of a controlling decision in a subsequent or distinct action, or one collateral in nature, will not cause an appeal to be non-final and thus unreviewable.

Questions Presented

1.

Is the 1974 New Jersey statute repealing retroactively the 1962 Covenant between the States of New Jersey and New York and with Port Authority bondholders, upon which holders of over $1,600,000,000 of Port Authority bonds relied, repugnant to Article I, Section 10, Clause 1 of the United States Constitution on the ground that such repeal impaired an obligation of contract?

2.

Is the 1974 New Jersey statute repealing retroactively the 1962 Covenant between the States of New Jersey and New York and with Port Authority bondholders, which conferred a valuable and substantial security right upon the holders of over $1,600,000,000 of Port Authority bonds, repugnant to the Fifth and Fourteenth Amendments to the United States Constitution on the ground that such repeal constituted a taking of property for public use without just compensation and without due process of law?

3.

Can the 1974 New Jersey statute which repealed the 1962 Covenant between the States of New Jersey and New York and with Port Authority bondholders, which was arbitrarily adopted without any legislative hearing or debate, with no mention whatsoever of any kind of an emergency, and which in fact was not related to any emergency, and which is repugnant to Article I, Section 10, Clause 1 of the United States Constitution and the Fifth and Fourteenth Amendments thereto, be upheld two years later by a court finding that it represented a valid exercise of the State's police power by reason of the coincidental existence of an emergency to which the legislature made no reference?

Constitutional and Statutory Provisions Involved

The Constitutional provisions which Appellant contends have been violated by the retroactive repeal of the 1962 Covenant are Article I, Section 10, Clause 1 of the United States Constitution, commonly known as the "Contract Clause", which provides in part as follows:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

and the following clauses of the Fifth and Fourteenth Amendments, respectively:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation", and
>
> "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

This case also involves N.J.R.S. § 32:1-35.55(b), the 1962 Covenant, set forth at pages B1-B4 of Appendix B, and Chapter 25 of the Laws of New Jersey of 1974, the retroactive repealer, set forth at pages B5-B6 of Appendix B.

Statement of the Case

Appellant instituted this action in three capacities: (1) as trustee for the holders of $200,000,000 of Port Authority Consolidated Bonds, (2) on its own behalf as holder of almost $100,000,000 of Port Authority Consolidated Bonds in trust and other fiduciary accounts and (3) on behalf of the holders of the over $1,600,000,000 outstanding Consolidated Bonds. The action seeks a declaratory judgment that Chapter 25 of the Laws of New Jersey of 1974, which unilaterally and retroactively cancelled a statutory covenant between the States of New York and New Jersey and with holders of Consolidated Bonds of the Port Authority, violates the United States Constitution.

The Port Authority was established in 1921 by a bi-state Compact as a financially independent authority to accomplish public purpose projects with funds contributed by private investors. The Port Authority was created to deal with the commercial needs of the Port of New York—the handling, distribution and transportation not of persons but of freight and cargo by rail, ship and motor truck. (Ch. 130, Laws of New Jersey of 1917). With only the support of a modest initial appropriation, the two States dedicated themselves in their Compact to the "encouragement of the investment of capital" in the Port Authority to finance those projects authorized for Port Authority development. Financing for these purposes was to be accomplished by giving the Port Authority power to mortgage its facilities

and to pledge the revenues from such facilities to secure the payment of bonds issued to private investors.

Port Authority Consolidated Bonds are not general obligations of the State of New Jersey or the State of New York. They are not backed by the general revenues of either State, are not guaranteed by either State and are not supported by any grant of either State's power to tax. Accordingly, the Port Authority throughout its history, until 1962, would only undertake projects which it believed would eventually contribute net revenues for the repayment of its bonds and was required by its creditors to enter into various contractual undertakings, to which the States often were parties, to protect the revenues and reserves pledged to bondholders.

In the early 1960's, it was proposed that, for the first time in its history, the Port Authority be directed to assume financial responsibility for a facility expected to require enormous capital expenditures and to sustain perpetual operating deficits. This was the Hudson & Manhattan Railroad, a privately owned interstate electric commuter railroad system then linking Manhattan, Newark and Hoboken. The takeover of the Hudson & Manhattan by the Port Authority was proposed at a time when the four commuter railroads operating in Northern New Jersey were sustaining total passenger operating deficits of almost $60,000,000 annually, the New York commuter railroads operating deficits of between $10,000,000 and $15,000,000 annually, and the New York City transit system operating deficits of $20,000,000 annually, exclusive of debt service charges of $87,000,000.

Of the several commuter rail systems serving the Port District, the financial prospects of the Hudson & Manhattan were by far the worst. It had been in reorganization for many years, and in 1959 the bankruptcy court approved a plan which left the railroad with enough cash to continue

operations for only two years, with no funds for capital expenditures. *In re Hudson & Manhattan R.R.*, 174 F.Supp. 148 (S.D.N.Y. 1959), *aff'd sub nom., Spitzer* v. *Stichman*, 278 F.2d 402 (2d Cir. 1960).

In 1961, the New York State legislature enacted legislation directing the Port Authority to take over and operate the Hudson & Manhattan, with no limitation on the agency's future involvement in deficit rail mass transit.*

The New Jersey legislature did not concur. In spite of the fact that there were other financial tests, undertakings and provisions for bondholder protection then in effect relating to Consolidated Bonds, the New Jersey legislative committee which had been conducting hearings on the matter concluded that the Port Authority could only hope to borrow the funds necessary to take over the Hudson & Manhattan if the States agreed to limit, by a "constitutionally-protected" statutory covenant, the extent of the future involvement of the agency in the enormous deficits incurred by the area's commuter rail systems.** New York concurred and the legislation adopted was the 1962 covenant, which provides in part:

> "The 2 States covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds

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* In response to this 1961 New York legislation, Appellant, then the largest single holder of Port Authority Consolidated Bonds, immediately stopped purchasing such bonds and adopted a policy of replacing its holdings of Port Authority Bonds. Upon the adoption of the 1962 Covenant, Appellant again began purchasing Consolidated Bonds for its fiduciary accounts, increasing its holdings to over $96,000,000 at the time the Covenant was retroactively repealed.

** As the Superior Court found: "the Legislature of 1962 concluded that it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority." A90.

> remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, . . . (b) neither the States nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth. . . ."

The 1962 Covenant accomplished its purpose. On September 1, 1962, the Port Authority took over the Hudson & Manhattan through its PATH subsidiary, obtaining the funds necessary for the acquisition and modernization of the railroad by the successful sale of bonds to private investors. In fact, in 1962 and 1963, when the value of the Covenant was fresh in the minds of the legislators, the two States joined in a most vigorous defense of the legislation embodying the Covenant which finally resulted in a decision on the merits by this Court that the constitutional attacks on the validity of such legislation did not present any substantial Federal question. *Courtesy Sandwich Shop* v. *Port of New York Authority,* 12 N.Y. 2d 379, *appeal dismissed,* 375 U.S. 78, *rehearing denied,* 375 U.S. 960 (1963). Notwithstanding the fact that every other major commuter rail system in the Port District (Penn Central, Erie Lackawanna, Central Railroad of New Jersey) passed through bankruptcy proceedings, private investors, knowing of the protection of the 1962 Covenant against unlimited involvement of pledged revenues and reserves in deficit rail mass transit,* continued to purchase Port Authority Consoli-

* The Covenant was described in detail in *every* Official Statement following the date of its enactment, in the Port Authority's Annual Reports, and in Information Sessions held by the agency and its underwriters to acquaint prospective investors with the investment merits of Consolidated Bond offerings.

dated Bonds on favorable terms through the 1960's and early 1970's.

In 1973, in connection with proposed PATH rail extensions to Kennedy Airport in New York and to suburban New Jersey, the two States, after extensive hearings, adopted legislation *prospectively* repealing the 1962 Covenant. By this action, the States in effect reaffirmed the Covenant's protection for the over $1,400,000,000 in outstanding bonds by refusing to repeal the Covenant retroactively with respect to such bonds.* (Ch. 1003, Laws of New York of 1972; Ch. 318, Laws of New York of 1973; Ch. 208, Laws of New Jersey of 1972). In the spring of 1974, fulfilling a campaign promise, newly-elected Governor Byrne of New Jersey pushed through legislation to cancel the Covenant unilaterally and retroactively with respect to outstanding Consolidated Bonds. In marked contrast to the extensive hearings, reports and findings surrounding the enactment of the Covenant in 1962 and its prospective repeal in 1973, no hearings were held, no alternatives were examined, and bondholders were not notified of the pending legislation. At no time, either upon the passage of the bill or upon the signing of it by the Governor, was there any mention of any emergency caused by the gas shortage or air pollution or anything else. The companion legislation in New York was adopted following a brief legislative colloquy in which it was inferred that the Port Authority's Consolidated Bonds were guaranteed by both States. In fact, of course, they are not.

* Since bonds protected by the Covenant remained outstanding, the Covenant's protection continued in fact for bonds of series issued after the prospective repeal until the maturity or earlier redemption of the protected bonds.

How the Federal Questions Were Raised and Decided Below

Appellant in its Complaint asserted that the retroactive repeal of the 1962 Covenant constituted an impairment of the contract between the two States and with the bondholders in violation of the Contract Clause of the United States Constitution and that such repeal constituted a taking of the bondholders' property in violation of the Fifth and Fourteenth Amendments to the Constitution.

The Superior Court held that: "the repeal legislation was a reasonable and hence valid exercise of the states' police power which is not prohibited by the Contract Clause of either the Federal or the State Constitution." (A109). In a footnote, that court stated that it would not consider Appellant's arguments based on the Fifth and Fourteenth Amendments since, to the extent that claim was based on a decline in the price of the bonds in the secondary market for the bonds it was factually rejected and, in any event, the test of Constitutional validity as applied to repeal legislation is the same under both the Contract and the Due Process Clauses. (A94 n.36).

The Superior Court then entered an order dismissing Appellant's complaint and ordering judgment in favor of defendants on that portion of their counterclaim which sought a declaratory judgment that Chapter 25 was constitutional.

On appeal, the Supreme Court of New Jersey affirmed "substantially for the reasons set forth in the opinion [below]". (A4).*

* On December 10, 1974, the Superior Court ordered that an existing action in which Appellant had intervened, *Gaby* v. *The Port of New York Authority, et al.*, be consolidated with Appellant's action for certain limited purposes. At issue in *Gaby* was the Constitutional validity of the 1962 Covenant. In view of the decision as to the validity of the retroactive repeal of the Covenant, the *Gaby* case was dismissed by the Superior Court, the dismissal was affirmed by the Supreme Court of New Jersey and the case will not be further discussed hereafter.

The Federal Questions Are Substantial

I

The judgment of the New Jersey Supreme Court presents the substantial question whether a State can unilaterally and retroactively revoke a solemn covenant it has made with holders of municipal bonds, or whether such bondholders are protected by the Contract and Due Process clauses of the United States Constitution.

The States of New Jersey and New York passed legislation in 1962 whereby they promised that if the investing public would continue to put its money into Port Authority Consolidated Bonds to enable the Port Authority to take over and operate the Hudson & Manhattan Railroad and to build the World Trade Center, neither they nor the Port Authority would apply any of the revenues or reserves pledged as security for those bonds for any railroad purposes whatsoever other than permitted purposes defined in the legislation. As stated above, in 1962 the four Northern New Jersey commuter lines, the New York commuter railroads and the New York City transit system were showing annual operating deficits of about $60,000,000, $10,000,000 to $15,000,000, and $20,000,000 respectively. To protect the bondholders by preventing pledged revenues and reserves from being consumed by these appalling and inevitable deficits was no idle promise. It was a promise which was absolutely necessary in order to induce the investing public into continuing to buy Consolidated Bonds. It was a promise which was absolutely repudiated without any hearing or any debate by the New Jersey legislature. Is it any wonder that the entire investing public and, in particular, the municipal bond market is waiting for this Court to tell them whether they can rely upon the pledged word of a

State—whether a State will be permitted under the United States Constitution to make a promise to entice investment in municipal bonds and then repudiate it when it serves its purpose so to do?

During the trial below, representatives of each of the four principal areas of the municipal bond industry* testified without contradiction that the secondary market for Port Authority Consolidated Bonds had been dramatically disrupted by the retroactive repeal of the Covenant. A dealer in the bonds testified that in relation to bonds of comparable quality and maturity Port Authority Bonds had fallen by 6 to 12 points, or $60 to $120 per $1,000 principal amount, as a direct result of the retroactive repeal of the Covenant. There was also uncontroverted testimony with respect to the value of the 1962 Covenant as a security device not duplicated by other contractual undertakings with bondholders.**

The witnesses at the trial below also testified without contradiction regarding the effect of the retroactive repeal of the 1962 Covenant on the market for municipal bonds issued by New Jersey and New York. Purchasers of municipal bonds represent perhaps the most conservative of investors, willing to sacrifice higher yields because of the tax benefits attendant upon this type of obligation, the almost absolute assurance of repayment and, in the mean-

* Investment banking (John F. Thompson of W. H. Morton Division of American Express Company and Lester Murphy of Barr Brothers), investment advisory (John F. Thompson), dealers (Lester Murphy and Austin Fitzgerald of Weedon & Co.) and institutional investors (Gordon Fowler of Connecticut General Life Insurance Company).

** The Covenant's unique value as a security device is demonstrated by the fact that, promptly following the decision of the New Jersey Supreme Court below, the two states announced that the Port Authority would be required to give to each state $120 million, a total of $240 million, for mass transit purposes.

time, the assurance of a liquid investment. Purchasers of municipal bonds finance public purpose projects from fire trucks to airports, all upon the market's understanding that the contractual undertakings between issuers and private investors are inviolate. Thus, the witnesses below testified that many institutional investors, as a result of the retroactive repeal of the 1962 Covenant, simply crossed New York and New Jersey obligations entirely off their lists, undoubtedly contributing to the dire financial situation in which New York City and New York State are presently enmeshed.

This Court should hear this appeal in order finally to determine whether the promises made by States to the creditors of state agencies mean what they say or whether they are subject to arbitrary unilateral cancellation whenever the Legislatures believe that course to be politically expedient.

II

It is of great importance to Port Authority bondholders that this Court decide that the repealer is unconstitutional, thus returning the security provided by the Covenant and restoring the market for the bonds.

The Superior Court found* that bondholders' reliance on the Covenant was not the "primary consideration" for the purchase of their bonds. The Superior Court said: "no

* This Court is not bound by the Superior Court's factual findings. This appeal involves "a conclusion of law as to a Federal right and a finding of fact . . . so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske* v. *Kansas*, 274 U.S. 380, 385 (1927); *see also Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954) (" . . . the long course of judicial construction . . . establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.")

witness testified that purchases would *not* have been made without the covenant,* but only that they would not have purchased or recommended the purchase of the bonds 'at the price which they were then offered' ". (A91). To say that bondholders would not have purchased the bonds on the proffered terms absent the Covenant is to say that bondholders would not have purchased the bonds at all absent the Covenant, since investors were not offered a bond at one interest rate with the Covenant's protection and another bond at a much higher interest rate without it. They were offered a package and each witness below testified that neither they nor their customers were interested in the package without the Covenant.

The court below implied that bondholders should be satisfied with the contractual protections which preceded the adoption of the Covenant, since Port Authority bonds in fact were purchased before the enactment of the Covenant. This is a tempting fallacy but a fallacy nonetheless. Prior to the Covenant's enactment, the power of the States to direct the Port Authority into any perpetual deficit undertaking was only theoretical since the necessary private financing would never have been forthcoming on acceptable terms. When it became apparent that the States intended to change the agency's course and direct it into a field inherently incapable of profitable operation, then and only then were the existing statutory and contractual protections for bondholders wholly inadequate. Then and

* This statement by the Superior Court is inaccurate. John F. Thompson, the dean of municipal bond analysts, testified in part:

"Q. If you knew that the covenant would later be repealed would you have recommended the Port Authority bonds during the '60s?

"A. No." (T 86-14 to 17).

only then did some reasonable financial limitation become an absolute *sine qua non* of future Port Authority Consolidated Bond financing on reasonable terms. The 1962 Covenant was the limitation agreed upon by the States.

Similarly, the Superior Court required proof of "permanent" secondary market damage as a result of the repeal. That proof is in the record—the very recovery in the bonds which the Superior Court relied upon to support its conclusion that damage was not "permanent" was explained as a short-term technical adjustment in the market prompted by purchases to cover short sales in the closing months of the preceding year. Further, after the retroactive repeal the market for Port Authority bonds became "extremely thin" and "sensitive" so that a sale of a large block of the bonds could not be made at the current bid price but only at a price substantially below it. The Superior Court found no significance in this market disruption or in a market decline of 6 to 12 points (some $60 to $120 per $1,000 principal amount of bonds) as a direct result of the Covenant's repeal, notwithstanding the fact that over $1,600,000,000 in bonds are outstanding. With respect to a single $100,000,000 issue of Consolidated Bonds this decline represents a diminution in market value of between $6,000,000 and $12,000,000. This, to the courts below, was not an impairment of constitutional proportions.

The Superior Court did concede that bondholders' security had been diminished:

> "To the extent that the repeal of the covenant authorizes the Authority to assume greater deficits for such purposes, it permits a diminution of the pledged revenues and reserves and may be said to constitute an impairment of the states' contract with the bondholders." A95.

The present planned "diminution" is $240 million, with no assurance to bondholders that this is not just the beginning. The possibility of such increasing diversions, to the courts below, was not an impairment of constitutional proportions.

III.

The court below erroneously justified the violation of the impairment provisions of the Constitution by terming the retroactive repeal of the 1962 Covenant an exercise of the police power.

The 1962 Covenant is the clearest possible example of a contract made by a State with certain of its citizens. The opening words of the Covenant read: "The 2 States covenant and agree with each other and with the holders of any affected bonds. . . ." Such a contract must be secure against impairment under the Contract Clause of the United States Constitution and, since a property right is created, protected by the Federal Due Process Clause. A95 n.38; see *Indiana* v. *Brand,* 303 U.S. 95, 100 (1938); *New Jersey* v. *Yard,* 95 U.S. 104 (1877). It was passed only following exhaustive legislative hearings and was enacted as a bargained-for "constitutionally-protected" (in the words of the New Jersey legislative committee) statutory covenant.

The Superior Court's holding that the repeal was constitutional, notwithstanding the conceded impairment, is based on an erroneous application of language derived from *W. B. Worthen Co.* v. *Kavanaugh,* 295 U.S. 56 (1935). The Superior Court stated the test of constitutionality as follows:

> "Conceding the existence of some impairment of bondholder security as a result of the repeal, has the action of the states destroyed the quality of their security as an 'acceptable investment for a rational investor'?" A107-A108.

It is from *Kavanaugh* that the Superior Court adopted its test of constitutionality. 295 U.S. at 60. The Superior Court, however, misread the holding in *Kavanaugh.* This Court held there that in enacting the challenged legislation the legislature had "put restraint aside" and "with studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor." *Id.* This Court specifically noted that the changes wrought by the challenged legislation were so substantial that the State had transgressed the "outermost limits" of constitutional bounds:

> "In the books there is much talk about distinctions between changes of the substance of the contract and changes of the remedy. . . . The dividing line is at times obscure. There is no need for the purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. . . . *We state the outermost limits only. In stating them we do not exclude the possibility that the bounds are even narrower.* The case does not call for definition more precise. A catalogue of the changes imposed upon this mortgage must lead to the conviction that the framers of the amendments have put restraint aside. With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor." *Id.* (emphasis added).

Thus, although in *Kavanaugh* the Court was careful to state that the destruction of the quality of the security "as an acceptable investment for a rational investor" constituted the "outermost limits" of the bounds of which a state may not transgress, the Superior Court adopted these outer limits as its standard for determining the constitutionality of the 1974 repeal legislation. The Superior Court has turned what to this Court was an unconstitutional maximum into a required minimum.

If only those acts of the State which resulted in the destruction of a contract as an acceptable investment were constitutionally impermissible, then virtually no covenant or combination of covenants in a bond resolution or statute would be safe from abrogation. There are, after all, innumerable covenants and provisions in bond resolutions and statutes, the abrogation of which would not "destroy" the bond's security, but which obviously would result in a material impairment.

Additionally, the Superior Court erroneously held:

> "The line of demarcation between *Blaisdell* and *Kavanaugh* may be expressed as one of degree: The states' inherent power to protect the public welfare may be validly exercised under the Contract Clause even if it impairs a contractual obligation so long as it does not destroy it." A102.

The Superior Court concluded that the framers of the Constitution of the United States meant "destroy" when they said "impair." *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934), certainly does not support this extreme view, since it merely involved a postponement of remedies for a short period of time.

In reaching its conclusion that the retroactive repeal of the 1962 Covenant was "a reasonable and hence valid exercise" of the police power, the Superior Court found:

> "Suffice it to say that between 1962 and 1974 the security afforded bondholders had been substantially

> augmented by a vast increase in Authority revenues and reserves, and the Authority's financial ability to absorb greater deficits, from whatever source and without any significant impairment of bondholder security, was correspondingly increased. During the same interval mass transit facilities within the District continued to deteriorate while the public need for such facilities became unprecedented as the result of the promulgation of stringent federal air pollution regulations designed to reduce automobile usage and the emergence of an energy crisis which threatened the entire system of private automobile transportation in the two States." A106-A107 (footnotes omitted).

The Superior Court's first conclusion, that the Port Authority's ability to absorb deficits has greatly increased, is simply inaccurate. Its second conclusion, that mass transit facilities would decline while public need increased, was fully contemplated in 1962.

While the Port Authority's revenues greatly increased in the 1960's and early 1970's so did its expenses and reserve requirements, so much that the actual surplus revenues of the Port Authority in excess of mandated reserves increased only $2,718,000 in the 13 years from the enactment of the Covenant to its retroactive repeal, while, during the same period, the principal amount of outstanding Consolidated Bonds increased from approximately $690,000,000 to over $1,600,000,000.

The alleged improvement in the Port Authority's financial position cannot justify repeal of the Covenant, even if it existed. If it could, then any contractual undertaking with bondholders, if effective in contributing to an improvement in the obligor's financial well-being, would be subject to arbitrary cancellation. Surely it takes more to justify the State in abrogating its promise!

The pressing need for rail mass transit facilities in the Port District was the very reason the Covenant was

enacted—to enable the Port Authority to take over the destitute Hudson & Manhattan, while maintaining investor confidence in light of the certainty that rail mass transit systems would continue to decline financially.

The Superior Court based primary reliance on this Court's decision in *City of El Paso* v. *Simmons*, 379 U.S. 497 (1965). *El Paso*, a case dealing with squatters' rights in Texas, is clearly distinguishable.

Briefly stated, the facts in *El Paso* were as follows: In 1910, the State of Texas sold public land to plaintiff's predecessor in title in accordance with a State policy of selling such lands to raise funds for public schools. The purchase money mortgage contract was extremely favorable to the purchaser and, in practice, the time for payment of principal was periodically extended and, in fact, was never called due. The State retained a right of forfeiture if the owner failed to pay interest, but the owner or his vendees were entitled to reinstatement, provided no rights of third persons had intervened. The right to reinstatement was therefore defeasible and the State always had pursued a policy of quick resale of the forfeited lands to a third party, thus cutting off the right to reinstatement. In 1941, legislation was enacted providing that the right of reinstatement had to be exercised within five years from the date of forfeiture or the effective date of the act, whichever was later. Plaintiff, who filed his application for reinstatement more than five years after the date of forfeiture, filed suit to determine title to the land, claiming that the 1941 legislation violated the Contract Clause.

The narrow exception to the rule that a State may not repudiate its contractual undertakings which was established in *El Paso* has no application to the repeal of the 1962 Covenant. Unlike *El Paso*, here the State has many

alternatives* to deal directly or indirectly with the requirements for commuter rail mass transit. Here the repudiated obligation was in fact a substantial inducement to private investors lending their funds to an agency of the State. To argue whether it was "a primary inducement" is to quibble. Suffice it to say that it was a *sine qua non* of the purchase by the bondholders of these particular Consolidated Bonds. Here the investors reasonably expected the State's obligation to endure until their bonds were satisfied. Here, rather than the dramatic change in circumstances present in *El Paso*, the very danger foreseen in 1962 and sought to be protected against by the Covenant came to pass. Here, unlike *El Paso*, if any unforeseen or unexpected benefits have been conferred they have been conferred on the State. In 1962, it was expected that the Port Authority would be taking off the States' hands in the future deficits for operating the old Hudson & Manhattan in an amount which would level off at $6,575,000 annually. In fact, those deficits now exceed $35,000,000 annually, and the States refuse to remedy the situation through fare increases. Here, unlike *El Paso*, the bondholders' contract has been totally cancelled rather than modified by some reasonable adjustment in its terms. In marked contrast, when the terms of the Triborough Bridge Authority bonds were changed to benefit mass transit, the bondholders were

* Several obvious alternatives are: to guarantee an issue of Port Authority bonds for mass transit purposes; to allow the Port Authority to increase PATH fares to competitive levels, thus freeing more funds for railroad purposes under the Covenant's formula; to issue State bonds and simply utilize the Port Authority's operating expertise; or to refund outstanding bonds protected by the Covenant and secure bondholder consent under those issues not yet refundable. These alternatives demonstrate that this case does not involve any lofty governmental purpose. Rather, it involves money, and only money, a desire by the State to further lessen government expenditures. This has never been sufficient to justify the cancellation of a State's contract. *E.g., Lynch* v. *United States*, 292 U.S. 571, 580 (1934).

consulted and consented to the change after obtaining an increase in the interest rate. *El Paso,* therefore, is distinguishable from this case upon every ground on which that decision was based. This case presents the clearest example of an unconstitutional impairment of contract and a taking of bondholders' property without just compensation and without due process of law.

Conclusion

This Court should reverse the judgment of the Supreme Court of New Jersey or, in the alternative, note probable jurisdiction of the appeal and, if the Court deems it appropriate, order the appeal deferred pending resolution of the related action in New York.

Respectfully submitted,

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APPENDIX A

Decision of the Supreme Court of New Jersey

UNITED STATES TRUST COMPANY OF NEW YORK, AS TRUSTEE FOR THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY CONSOLIDATED BONDS, FORTIETH AND FORTY-FIRST SERIES; ON ITS OWN BEHALF AND ON BEHALF OF ALL HOLDERS OF CONSOLIDATED BONDS OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLANT-CROSS-RESPONDENT, v. THE STATE OF NEW JERSEY; BRENDAN T. BYRNE, GOVERNOR OF THE STATE OF NEW JERSEY; AND WILLIAM F. HYLAND, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

DANIEL M. GABY, PLAINTIFF-CROSS-APPELLANT, v. THE PORT OF NEW YORK AUTHORITY, JAMES C. KELLOGG, III, HOYT AMMIDON, GUSTAVE L. LEVY, JAMES G. HELLMUTH, ANDREW C. AXTELL, WILLIAM J. RONAN, W. PAUL STILLMAN, WALTER H. JONES, BERNARD J. LASKER, PHILIP B. HOFFMAN, AND JERRY FINKELSTEIN, COMMISSIONERS OF THE PORT OF NEW YORK AUTHORITY, AUSTIN J. TOBIN, EXECUTIVE DIRECTOR OF THE PORT OF NEW YORK AUTHORITY, AND WILLIAM T. CAHILL, GOVERNOR OF THE STATE OF NEW JERSEY, DEFENDANTS-CROSS-RESPONDENTS, AND UNITED STATES TRUST COMPANY OF NEW YORK, ETC., INTERVENOR.

Argued October 7, 1975—Decided February 25, 1976.

SYNOPSIS

Class action on behalf of citizens, residents and taxpayers whose occupations were dependent upon the existence of mass transportation was brought against Port Authority of New York and New Jersey challenging constitutionality of covenant between the States of New Jersey and New York on one hand and the holders of bonds issued by the Port Authority on the other hand with respect to the use to which certain revenues were to be put. After the covenant was repealed by New Jersey Legislature, trustee for the bonds brought action challenging the constitutionality of the repealing statute. The Superior Court, Law Division, 134 *N. J. Super.* 124, upheld the constitutionality of the repealer and dismissed the class action and the parties appealed. The Supreme Court held that compact which created the Port Authority empowered, but did not mandate, the Authority to develop a plan for a particular kind of method of transportation; and that, since the Authority had exercised its discretion by rejecting a policy favoring mass transportation, mandamus did not lie to compel the Authority to develop a plan for mass transit even though, by virtue of repeal of the covenant, it had the funds to do so.

Affirmed.

Pashman, J., concurred in part and dissented in part and filed an opinion.

Mr. Robert B. Meyner and *Mr. Devereux Milburn*, of the New York bar, argued the cause for appellant-cross-respondent-intervenor United States Trust Company (*Messrs. Meyner, Landis and Verdon*, and *Messrs. Carter, Ledyard and Milburn* and *Hawkins, Delafield and Wood*, of the New York bar, attorneys; *Mr. Meyner, Mr. Milburn*, and *Mr. Donald J. Robinson*, of the New York bar, on the brief and of counsel).

Mr. Murray J. Laulicht and *Mr. Michael I. Sovern*, of the New York bar, Special Counsel to the Attorney General, argued the cause for respondents-cross-appellants State of New Jersey, Brendan T. Byrne and William F. Hyland (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Laulicht, Mr. Sovern* and *Mr. Harold Edgar*, of the New York bar, Special Counsel to the Attorney General, on the brief).

Mr. Howard Stern argued the cause for plaintiff-cross-appellant Daniel M. Gaby (*Messrs. Shavick, Stern, Scholz, Steiger and Croland*, attorneys; *Mr. Stern* on the brief. *Mr. Stern* and *Mr. Theodore W. Kheel* of the New York bar and *Messrs. Battle, Fowler, Stokes and Kheel* of the New York bar, of counsel).

Mr. Francis A. Mulhern argued the cause for cross-respondent The Port Authority of New York and New Jersey, et al. (*Mr. Mulhern,* attorney and on the brief; *Mr. Patrick J. Falvey* of the New York bar, *Mr. Joseph Lesser* of the New York bar, *Ms. Isobel E. Muirhead, Mr. Arthur P. Berg* of the New York bar, and *Mr. Vigdor D. Bernstein,* of counsel).

PER CURIAM. The judgment is affirmed, substantially for the reasons set forth in the opinion of Judge Gelman, 134 *N. J. Super.* 124 (Law Div. 1975). The observations which follow are occasioned by Justice Pashman's suggested remedy in the Gaby suit.[1]

Whatever persuasive force might be accorded the argument that as a matter of policy the Port Authority should devote more of its energies and resources to the mass transit field, the fact remains that the remedy fashioned by our Brother is neither pressed for by Gaby on this appeal nor within the powers of this Court to direct and enforce.

Gaby's class action complaint for a declaratory judgment that the 1962 Covenant was unconstitutional asked for "multifarious relief," including a request that the Port Authority be directed "to formulate and submit to the court a plan for the development of mass transit facilities within the Port District," 134 *N. J. Super.* at 131. However, the trial judge, having concluded in the *United States Trust Co.* suit that "the repeal legislation was a reasonable and hence valid exercise of the states' police power which is not prohibited by the Contract Clause of either the Federal or the State Constitution," *id.* at 197, found it unnecessary to reach the issue of the 1962 Covenant's asserted invalidity. He therefore dismissed Gaby's complaint, *id.* at 198, without discussing the requested relief of a direction for development of a mass transit plan, on which issue there was neither testimony nor argument at the trial level.

[1]Justice Pashman would order the Port Authority to complete pending projects and to "formulate and present plans and suggestions for a regional mass transportation scheme to the Legislatures of New York and New Jersey * * * in an expeditious fashion and within a fixed period of time." *Post* at 288.

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In his brief filed in the Court after direct certification of his appeal, 68 *N. J.* 175 (1975), Gaby conceded his limited purpose in pursuing the appeal as being "to preserve the issue of the constitutionality of the 1962 Covenant." The point of this in turn was, as he put it, to furnish "an alternative ground for affirming the decision below."[2] Whatever issues may have been preserved by his appeal and whatever desire there may have been to present "all the issues," the fact remains that Gaby's brief raises and discusses only the validity of the Covenant in constitutional terms. No argument is made there for any special relief; and, understandably, the Port Authority has likewise not briefed the question at all in this Court. At oral argument the subject was adverted to only in a limited fashion.

Ordinarily, we would have no occasion to decide an issue which, while portentous in itself, has become so remote and peripheral to the central thrust of this litigation. However, inasmuch as the minority opinion raises and discusses *in extenso* this question of considerable public significance, namely, the involvement of the Port Authority in mass transit and particularly the propriety of this Court ordering as a specific remedy the submission of a plan for development of mass transit facilities, we overlook whatever infirmities may exist in the record before us, compounded by the practical disadvantage of not having the views of the parties, and proceed to address the point.

[1] The 1921 Compact between the States of New York and New Jersey, whereby the Port Authority was created, *N. J. S. A.* 32:1–4, envisioned the adoption of a Comprehensive Plan for the development of the port. *N. J. S. A.*

[2]Cross Motion for Certification of Plaintiff-Respondent, Daniel M. Gaby.

32:1–11. Direction was given to the Port Authority in the Plan itself "to proceed with the development of the port of New York in accordance with said comprehensive plan * * *." *N. J. S. A.* 32:1–33. That the Authority's involvement in transportation matters was contemplated is obvious from a reading of this and other portions of the Comprehensive Plan as well as of the Compact; but it requires a quantum leap to derive therefrom a mandate (as distinguished from the power) to develop a plan for a particular kind or method of transportation, to wit, mass transit. It is not without significance, for instance, that the legislature has provided that the Authority *may* make recommendations for the increase and improvement of transportation facilities, *N. J. S. A.* 32:1–13, which by definition includes railroads and any facility for the "transportation or carriage of persons or property," *N. J. S. A.* 32:1–23; but nowhere is it mandated that such recommendations be made. A mandate such as that contemplated by the minority opinion is not something to be inferred by the courts but rather is a singularly appropriate subject for specific legislative directive, conspicuously absent here. *Cf. Del. Riv. & Bay Auth. v. N. J. Pub. Emp. Rel. Comm'n.*, 112 *N. J. Super.* 160, 165 (App. Div. 1970), aff'd o. b., 58 *N. J.* 388 (1971).

If, then, the Authority is in the position of being empowered (as we acknowledge) rather than mandated to act in the area of mass transit, its exercise of that power becomes a matter of discretion and judgment. As is made abundantly clear by the voluminous record in this case, the trial court's opinion, and the concurring and partially dissenting opinion here, the Authority has more than once in recent years broached the question of whether it should pursue a policy of encouraging mass transit and has determined that it shall not. The remedy suggested in the minority opinion is designed to overrule that decision. As such it is in the nature of the former prerogative writ of *mandamus*, now invocable under proceedings for relief in lieu of prerogative writs, *Rule* 4:69.

[2, 3] However, *mandamus* will not lie if the duty to act is a discretionary one and the discretion has been exercised. As Justice Heher explained, in *Switz v. Middletown Twp.*, 23 *N. J.* 580 (1957), *mandamus* is "a coercive process that commands the performance of a specific ministerial act or duty, or compels the exercise of a discretionary function, but does not seek to interfere with or control the mode and manner of its exercise or to influence or direct a particular result." 23 *N. J.* at 587. As we have sought to demonstrate, the circumstances before us do not at all invite or accommodate the remedy proposed. This is so because the Authority (whose function is clearly not ministerial) has in fact exercised its discretion, even though that exercise has resulted in the rejection of a policy favoring mass transportation. Being a judgment decision its wisdom may be open to dispute; but as to the propriety of this Court's refusal to intrude on the underlying policy determination, there can be no question in the circumstances before us. And this not as a response to some procedural deficiency but because of our respect for the fundamental substantive principle embodied in *mandamus*.

Finally, we observe that in this particular area of bi-state operations, there is close and continuing supervision of the Port Authority by the other branches of government. Hence, the proposed remedy would not only tend to usurp the influence over the Authority vested in the Governors of the States of New York and New Jersey, but would also intrude upon the functions of the legislatures of the respective States, whose task it is in the final analysis to enact appropriate legislation and take such other action as may be required to remedy whatever deficiencies may exist with respect to mass transit.

Affirmed.

PASHMAN, J. (concurring in part and dissenting in part).

I

INTRODUCTION TO GABY COMPLAINT

My Brothers today affirm a lower court decision which was the product of two separate and distinct actions consolidated for trial. *United States Trust Co. v. State,* 134 *N. J. Super.* 124 (Law Div. 1975). In the first action, brought by plaintiff United States Trust Company, the trial court sustained the State's repeal of the 1962 statutory covenant (*N. J. S. A.* 32:1–35.55) between the States of New Jersey and New York and the holders of bonds issued by the Port Authority of New York and New Jersey (Port Authority). That covenant was concurrently enacted by the legislatures of New York and New Jersey at the time of the Port Authority's acquisition of the Hudson & Manhattan Railroad Company (H & M), since renamed the Port Authority Trans-Hudson System (PATH). Intended as a means of protecting the bondholders' investments, the covenant prohibited the states and the Port Authority from applying "any of the rentals, tolls, fares, fees, charges, revenues or reserves, . . . for any railroad purposes whatsoever other than permitted purposes." *N. J. S. A.* 32:1–35.55. As subsequently defined in the covenant, "permitted purposes" precluded the establishment, acquisition or construction of any railroad facility until the Port Authority could determine that the facility would be self-supporting or would not produce deficits except within narrowly defined limits.

In dismissing plaintiff's cause of action, the trial court found that the 1974 "repealer," *N. J. S. A.* 32:1–35.55a, was immune from constitutional challenge as an impairment of contractual obligation, a right which is protected by *U. S. Const.,* Art. I, § X and *N. J. Const.* (1947), Art. IV, § VII, ¶ 3. As a collateral finding, the court determined that the attractiveness of Port Authority bonds was not contingent upon the continued protection of the 1962 covenant, but rather upon the viability of the Port Authority itself.

The majority affirms the trial court on these bases and to this extent, I concur fully and completely with the conclusions reached by Judge Gelman in his very enlightened and comprehensive opinion. My agreement is premised on the unduly restrictive influence which the covenant exerted on Port Authority operations in contravention of the statutory mandates upon which that agency was created in 1921. The paralytic effect of the covenant could be seen in the Authority's practical inability and attitudinal reluctance to respond to the mounting needs for rapid transit in the New York metropolitan area. In light of the limited utility which it continued to serve, the 1962 covenant represented an artificial obstacle to the affirmative public action which was necessitated as an alternative to continued and wasteful reliance solely on the private automobile as the primary mode of transportation.

The second action, *Gaby v. Port of New York Authority, et al.,* was likewise concerned with the repeal of the 1962 covenant. Expanded into a class action on behalf of citizens, residents and taxpayers whose occupations are dependent upon the existence of mass transportation, plaintiff cites the 1962 covenant as an impediment to the improvement and expansion of these facilities. While the State of New Jersey sought the repeal of the covenant as an ultimate end in the *United States Trust Co.* action, plaintiff Gaby visualizes a repeal as merely a means to a larger end. This is because the vindication of Gaby's interests is only partially dependent on freeing the financial resources from the restrictions of the 1962 covenant and placing them at the Port Authority's disposal. More problematical and essential to the relief which he desires is the necessity to overcome the administrative inertia which has characterized the agency's efforts in the area of mass transportation. Consequently, Gaby requested in his complaint that the trial court:

> . . . [D]irect and order the Port Authority, its Commissioners, and its Executive Director to formulate and submit to this Court, or a Special Master to be appointed by this Court, a plan for the

development of mass transportation facilities in the Port District. . . . [Plaintiff Gaby's complaint at 17]

This action was pretried on February 22, 1973 and oral arguments were heard on September 26, 1973 on the parties' respective motions for summary judgment. Judgment was deferred and arguments were later rescheduled to permit the submission of briefs on additional issues and the intervention of United States Trust Company as a party defendant representing the interests of Port Authority bondholders. Prior to these arguments, the pendency of legislation repealing the covenant recommended that the trial court withhold further review. Accordingly, the proceedings were stayed to permit consideration of the anticipated legislation.

The statutory repealer which was signed into law by Governor Brendan T. Byrne on April 30, 1974 precipitated the *United States Trust Co.* action, which was instituted on the same day. On the basis of common subject matter, this later action was consolidated on December 10, 1974 with the previously filed *Gaby* case by order of the trial court. These matters then proceeded to trial in February 1975.

The trial was largely confined to the factual issues of bondholder reliance on the 1962 covenant and resultant damage to the secondary bond market caused by the repeal of the covenant. The information which was thus elicited formed the basis for the trial court's reported opinion, 134 *N. J. Super.* 124, in which the constitutionality of the 1974 repealer was sustained. Although reasons upon which the court's decision was grounded were clearly distinguishable from the constitutional arguments advanced by Gaby, the court's ultimate decision — the rejection of the 1962 covenant — coincided with Gaby's interests. Regardless of whether that result was achieved by sustaining the 1974 repealer as the trial court did, or whether it was achieved by finding the 1962 covenant itself unconstitutional as suggested by Gaby, the result indicated the possibility of granting the further relief sought by Gaby. A more activist role

for the Port Authority appeared to be a reality. Nonetheless, the court concurrently ordered the dismissal of Gaby's complaint, thus frustrating the additional relief which he sought. 134 *N. J. Super.* at 198. From this disposition, Gaby filed a cross-motion for direct certification which was granted on May 28, 1975. 68 *N. J.* 175 (1975).

Similar to his presentation before the trial court, Gaby's arguments are again directed towards a declaration of the unconstitutionality of the 1962 covenant. This is more the result of strategic considerations, however, than devotion to substantive principle. Recognizing the limited nature of the trial court's factual findings and disposition, Gaby has taken what appears to be a most advisable legal course. By preserving the issue of the constitutionality of the 1962 covenant on appeal, he has simultaneously preserved one of his major contentions should this or any other court reverse the trial court on the constitutionality of the 1974 repealer.

Furthermore, in his Supreme Court brief, Gaby explained that his contentions with regard to the 1962 Covenant are inextricably tied to his request for greater involvement of the Port Authority in mass transit projects:

The Appellant's Brief of Gaby is concerned with the validity of the 1962 Covenant (*N. J. S. A.* 32:1–35.50 *et seq.*). Central to the issue of the validity of the Covenant is the question whether the mass transportation of people within the Port District was one of the principal activities authorized by the Compact (*N. J. S. A.* 32:1–35.50 et seq.); whether the insulation of the Port Authority from that activity was in such derogation of the Compact as to frustrate its meaning and intent and so material as to require Congressional approval. [Plaintiff-Cross Appellant's brief at 3].

The majority today chooses to overlook this relationship in its reluctance to transcend the judgmental confines of the trial court and in its affirmation of that court's dismissal of Gaby's complaint. This disposition, undertaken in an unusually cavalier fashion, is not a product of some misunderstanding as to the essential relief which Gaby requests. On the contrary, the majority recognizes the strategic con-

siderations implicit in Gaby's desire to preserve the issue of the constitutionality of the 1962 Covenant. *Ante* (at 261). Nonetheless, in characterizing the constitutional arguments raised by Gaby as exemplifying a "limited purpose in pursuing the appeal," the majority misconstrues and frustrates the true interests of Gaby, and has done so in a manner which I find most distressing.

The majority justifies its truncated consideration of Gaby's plea by referring to an isolated phrase, taken out of context from a sentence which Gaby adopted as representative of his position in his cross-motion for certification. When more appropriately considered within the sentence in which it originally appeared, the phrase — "an alternative ground for affirming the decision below" — assumes an entirely different meaning from that which the majority attaches to it:

> **The purposes of this cross motion are identical with those stated by the State of New Jersey in its cross motion for certification: ". . . bring before the Supreme Court *all of the issues submitted to Judge Gelman* and to avoid the possibility that some of the issues submitted to Judge Gelman might have to be determined in the first instance by the Appellate Division. Because of the urgency and public importance of this case, it would be most unwise to require a piecemeal, appellate process, particularly since the [first] issue presented by this cross motion could be an alternative ground for affirming the decision below. . . ." [Plaintiff-cross appellant's appendix at 47a–48a; emphasis supplied].**

While the "first issue" refers to the constitutionality of the 1962 covenant, I believe it would be wrong to confuse Gaby's real interest in stimulating improvement of urban mass transportation with his more temporal interest in having the 1962 covenant declared unconstitutional. The majority not only fails to make this distinction, but fails to do so despite Gaby's expressed desire to present "all of the issues" to this Court.

This failure is only compounded by the majority's persistent willingness to ignore the Gaby complaint and the relief which it warrants. In spite of plaintiff's overindulgent concern for the constitutionality issue, the statement of his case reflects

more than a limited and perfunctory reference to the subject. During the course of oral argument, counsel for Gaby specifically stated:

> **Yes, as we read the compact between the states, the affirmative obligation of the Port Authority in this area is to plan. The immediate affirmative obligation . . . and indeed in these briefs and elsewhere, there is a suggestion that if the Covenant is invalid or the repealer upheld, either way, that it would be appropriate for the Court to direct the Port Authority to study mass transit needs in the Port Authority area and make proper proposals. Then when it comes to implementation, then you're talking about legislation of the two states, but the affirmative obligation of the Port Authority is to study the problem as it affects the Port area.**

It should be noted in passing, that this statement not only affirms the relief desired by plaintiff, but also embodies a request for a remedy which parallels that which I suggest below, *infra* at 287–288.

Therefore, although my Brothers remove the constricting fiscal shackles of the 1962 covenant, they fail to take the additional steps which flow as natural concomitants to the action which they affirm. This failure, as I see it, stems, in part, from a reluctance to go farther and faster in an area plagued by administrative inaction and intransigence. It also constitutes an indulgence in the meaningless gesture of sustaining the 1974 repealer without concurrently authorizing the relief needed to implement the initiative which the Legislature sought to instill in the Port Authority by that repeal.

As I fear, the administrative foot-dragging which was implicit in the 1962 covenant, may be only symptomatic of the inertia which has characterized the Port Authority in the field of mass transit operations. The majority's decision can only serve to perpetuate this sad state of affairs.

In light of the rapidly deteriorating condition of mass transit operations in the metropolitan area, this disposition is most unfortunate. Faced with the ever-increasing deficits which are inherent in this mode of public transportation, mass transit operations have been repeatedly shunned by the Port

Authority in spite of its statutory mandate to the contrary. As cutbacks in service have been experienced throughout the Port District, the commuters' resort to the private automobile has produced a dysfunctional volume of traffic congestion and pollution. The toll which this congestion has exacted has been obvious in the tunnels and on the bridges, whose operations the Port Authority apparently prefers to maintain.

Unlike today's majority, I am unwilling to assign plaintiff Gaby's case to death or to a peaceful somnambulism. This is particularly so where within the historical and evidential materials presented to the trial court reside the seeds for a more sweeping and effective disposition. I cannot sanction the mere repeal of the 1962 covenant without a concurrent assurance that the Port Authority will assume those responsibilities for which it was created and, which to this point, it has effectively avoided. The recalcitrance of the Port Authority has not been altered by the trial court's disposition and will not be altered by merely affirming that decision. A more effective disposition is needed.

II

HISTORY OF THE OBLIGATION OF THE PORT AUTHORITY TO PROVIDE MASS TRANSIT FACILITIES

In its opinion, the majority grudgingly acknowledges the Port Authority's obligation to become involved in mass transportation. After a perfunctory reading of the statutory framework of the Port Authority, the majority concludes that the existence of such a mandate is "a singularly appropriate subject for specific legislative directive, conspicuously absent here." (At 258).

While specific statutory directives have served as vehicles for recent Port Authority projects, *N. J. S. A.* 32:1–35.20 (authorization for the Port Authority to undertake mass transportation projects to link the various airports in the Port District), *N. J. S. A.* 32:1–35.21 (authorization to

build railroad lines to and facilities at the various airports in the Port District), its employment is in its infancy and affords no insight as to the previously reluctant forays which the Port Authority has made into the field of mass transportation. A full consideration of the statutory basis of the Port Authority and the history of its implementation reveals that the majority's interpretation of the Authority's powers and obligations is both short-sighted and erroneous. For instance, the statutory creation of the Port Authority evinces a clear legislative intent to have the Authority become involved in development of mass transportation. The majority position misconceives the role of the Authority to be a drone-like entity ultimately dependent upon enabling legislation, rather than a separate bi-state agency. Similarly, the majority fails to recognize the inherent limitations on the knowledge, information and expertise which are at the disposal of the New Jersey and New York Legislatures on the subject of mass transit operations. In light of this fact, the wisdom of relying upon legislative directives to address the panoply of needs within the field of mass transportation becomes problematical. The failure of the majority to account for these factors casts a large shadow upon the validity of its construction of the Port Authority's powers. These inadequacies within the majority position become apparent upon thorough consideration of the statutory origins of the Port Authority and the mandate which was encompassed in its original Compact and Comprehensive Plan.

A. Origins and Early Development; Compact and Comprehensive Plan

The Port Authority is a statutory product of a compact which was entered into by the States of New Jersey and New York in 1921.[1] Modeled after the recommendations of a joint

[1]New Jersey approved the compact by *L.* 1921, *c.* 151, now contained in *N. J. S. A.* 32:1–1 *et seq.* The comparable New York

commission,[2] the Port Authority represented a response to the dysfunctional competition and commercial disputes which historically had plagued the two states.[3] As such, it was intended to meet the needs and interests which the two states shared with respect to the Port of New York. This was expressly recognized in the preamble to the 1921 Compact, which stated:

> The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums

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legislation was adopted in *Laws of New York* 1921, c. 154, now contained in *N. Y. Unconsol. Laws*, § 6401 *et seq.* (McKinney 1961). Congressional consent to the compact was granted by *Pub. Res. No.* 17, *S. J. Res.* 88, c. 77, 42 Stat. 174.

At the time of creation, the agency was designated "The Port of New York Authority." *N. J. S. A.* 32:1–4. This was amended by *L.* 1972, c. 69, §§ 1, 2, contained in *N. J. S. A.* 32:1–4 and 32:1–4.1, to the more ecumenical "The Port Authority of New York and New Jersey." For the purposes of this opinion, the agency shall be referred to as the Port Authority or just Authority.

[2]The New York, New Jersey Port and Harbor Development Commission was a body whose representative membership were created by independent, though concurrently enacted bills which were passed by the Legislatures of New Jersey and New York in 1917. Composed of three commissioners from each state, the commission issued a preliminary report in 1918, New York, New Jersey Port and Harbor Development Comm'n, *Preliminary Joint Report, Transmitted to the Legislature*, February 18, 1918 (1918). This was followed by a progress report in 1919, and a comprehensive report in 1920, in which the commission proposed the establishment of a permanent body with interstate jurisdiction. *Joint Report with Comprehensive Plan and Recommendations* (1920). It subsequently submitted the tentative draft of the proposed compact. See *Bard, The Port of New York Authority*, 24–34 (1942).

[3]The enmity between the two states traces its roots as far back as the seminal case, *Gibbons v. Ogden*, 22 *U. S.* (9 Wheat.) 1, 6 *L. Ed.* 23 (1824). Although it has from time to time received exhaustive consideration in the case law, *New Jersey v. New York*, 28 *U. S.* (3 Pet.) 461, 7 *L. Ed.* 741 (1830); 30 *U. S.* (5 Pet.) 284, 8 *L. Ed.* 127 (1831); 31 *U. S.* (6 Pet.) 323, 8 *L. Ed.* 414 (1832); *In the Matter of Devoe Mfg. Co.*, 108 *U. S.* 401, 406–10, 2 *S. Ct.* 894, 27 *L. Ed.* 764 (1883); *State v. Babcock*, 30 *N. J. L.* 29 (Sup. Ct. 1862); *Central RR. of N. J. v. Jersey City*, 70 *N. J. L.* 81 (1903), a concise presentation of its history may be found in *Bard, supra*, footnote 2, at 5–24.

> of money, and the cordial co-operation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans. . . . [*N. J. S. A.* 32:1–1]

While the Compact delineated the framework for the Port Authority and its operations, the necessity for a more specific implementation was recognized in Article X, which directed the state legislatures to adopt "a plan or plans for the comprehensive development of the port of New York" "as soon as may be practicable." *N. J. S. A.* 32:1–11. The formulation of this plan was undertaken by the Authority's initial board of commissioners, whose *Report with Plan for the Comprehensive Development of the Port of New York, December 21, 1921* (1921) was eventually enacted as the Comprehensive Plan mandated by the Compact.[4]

This plan envisioned an active and affirmative role for the Port Authority in the development of the Port District.[5] Section 8 of the Comprehensive Plan provided:

> The Port of New York Authority is hereby *authorized and directed to proceed with the development of the port of New York* in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state, to effectuate the same, except the power to levy taxes or assessments. [*N. J. S. A.* 32:1–33; emphasis supplied]

That fulfillment of this statutory mandate contemplated the involvement of the Port Authority in transportation matters of the Port District is undeniable. This responsibility, for

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[4]The Comprehensive Plan was enacted in *L.* 1922, c. 9, now contained in *N. J. S. A.* 32:1–25 *et seq.* New York approved the Comprehensive Plan in *Laws of New York* 1922, c. 43, now found in *N. Y. Unconsol. Laws* § 6451–68 (McKinney (1961)). Congressional consent was secured in *S. J. Res.* of July 1, 1922, c. 277, 42 Stat. 822.

[5]The metes and bounds of the Port District are defined in *N. J. S. A.* 32:1–3.

example, was explicitly mentioned in that portion of the preamble of the Compact cited above. Article XXII of the Compact further clarifies this responsibility by defining "transportation facility" as including:

> . . . ***railroads***, steam or electric, motor truck or other street or highway vehicles, tunnels, bridges, boats, ferries, carfloats, lighters, tugs, floating elevators, barges, scows or harbor craft of any kind, aircraft suitable for harbor service, and every kind of transportation facility now in use or hereafter designed for use for the ***transportation or carriage of persons or property***. [*N. J. S. A.* 32:1-23; emphasis supplied]

The centrality of the railroads to the organizational and coordination schemes of the Port Authority was highlighted by the separate definition of "railroads."[6] This was a reflection of the final report by the New York, New Jersey Port and Harbor Development Commission, which in 1920 had recommended the establishment of a bi-state agency with appropriate jurisdiction. See footnote 2, *supra*. The report, whose factual findings served as the basis for the Compact and the Comprehensive Plan, found the commercial inadequacies of the metropolitan area to be "primarily a railroad problem." The absence of railroad coordination and accessibility at many places within the district consequently required "essentially a railroad plan." The Commission summarized its suggestions in a proposal which entailed the establishment of railroad beltline systems between New Jersey and New York, and concluded:

> This remodeled terminal railroad system, bringing every railroad of the Port to every part of the Port, and thus giving every part of the Port opportunity to develop and to have the economical transportation service needed for its commercial and industrial growth and expansion, constitutes the comprehensive plan of the Commission — the plan which the Commission recommends for formal adoption by the two states. [New York, New Jersey Port and Harbor Development Commission, *Joint Report*, *supra* footnote 2, at 3]

[6] *N. J. S. A.* 32:1-23 provides:

> "Railroads" shall include railways, extensions thereof, tunnels, subways, bridges, elevated structures, tracks, poles, wires, conduits, powerhouses, substations, lines for the transmission of power, car barns, shops, yards, sidings, turnouts, switches, stations and approaches thereto, cars and motive equipment.

This statutory responsibility to develop the transportation facilities of the Port District, and particularly facilities relating to railroad operations, contained an implicit obligation to foster passenger transportation service. Although the Port and Development Commission report concentrated on the freight shipment needs of the area, it did not preclude a comparable role for the Port Authority in passenger service. With one notable exception, the Port Authority's role in passenger service is confirmed by the early history of the agency. In this regard, however, even that exception, the 1928 veto message of Governor Alfred E. Smith of New York which rejected a New Jersey proposal for the development of a rapid transit system between the states, may be no more than a personal predilection. [7] See 134 *N. J. Super.* at 149. Noting that the Port Authority should "stick to this program . . .[for] the solution of the great freight distribution problem," Governor Smith at no time denied the agency's power to deal with passenger service, and only suggested a reordering of its priorities. More importantly, the position which he advocated was expressly repudiated by the Port Authority that same year. In a June 11, 1928 resolution supporting the continuation of a Suburban Transit Engi-

[7] Governor Smith, in what remains the only major statement questioning a Port Authority role in passenger traffic, remarked:

> I am satisfied that the Port Authority should stick to this program, and I am entirely unwilling to give my approval to any measure which at the expense of the solution of the great freight distribution problem will set the Port Authority off on an entirely new line of problem connected with the solution of the suburban passenger problem.

Veto Message, *Public Papers of Governor Alfred E. Smith of 1928*, 187–88 (1938).

neering Board,[8] the Port Authority recognized that it had a responsibility to the metropolitan commuter, based on its broader duty to develop transportation in the Port District:

> **The Commissioners of the Port Authority have found in their studies that no adequate or effective interstate transportation development can take place without taking full account of *transportation of passengers* as well as of freight throughout the Port District.[9] [Emphasis supplied]**

B. *Port Authority Involvement in the Area of Mass Transit; Reports, Studies and Legislation Concerning Mass Transit*

The continuance of its role in mass transportation has been reaffirmed by the Port Authority from time to time. The obligation to provide for passenger service within the

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[8]**The Suburban Transit Engineering Board had been created in response to a Port Authority suggestion in its 1927 Annual Report. As that report stated:**

> **It is our opinion that, in the long run, the greatest progress will be attained by having this Engineering Board undertake the responsibility for the preparation of the engineering section of a comprehensive suburban transit plan for the entire port district. The Port of New York Authority, *Annual Report for 1927*, 56 (Jan. 20, 1928).**

Parenthetically, it should be noted that this body was the intended recipient of the funds which Governor Smith vetoed. The Port of New York Authority, *Annual Report for 1928*, 63 (Dec. 31, 1928).

[9]***Annual Report for 1928, supra* footnote 8, at 64–66. The Port Authority answered more directly the fears expressed by Governor Smith in a subsequent part of its June 11, 1928 resolution:**

> **The Commissioners of the Port Authority are satisfied from the reports of their staff that continuance of the work of the Suburban Transit Engineering Board and the participation therein by members of the staff of The Port of New York Authority will not at this time divert any of their efforts away from the effectuation of the statutory Comprehensive Plan nor from their duties in the field of protecting the Port nor from any other pending work of the Port Authority, but on the contrary, the continuance of such Suburban Transit Engineering Board's work will facilitate the other work of the Port Authority. [*Id.* at 65]**

Compact's injunction to the Post Authority has not only been acknowledged by those whose occupations and interests are related to the transportation field,[10] but by ranking members of the Port Authority staff as well. For example, the following colloquy between Assemblyman J. Edward Crabiel and the Port Authority's then Executive Director Austin J. Tobin occurred at a 1958 legislative hearing:

> **ASSEMBLYMAN CRABIEL: Mr. Tobin, just to clear my mind on certain key points — I have been reading your report and listening to your talk — there is no question that, as far as the compact between the two states is concerned, *the Legislatures could direct the Port Authority to do rapid transit and that that would be within their compact.***
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> **MR. TOBIN: *Yes sir. There's no question about it.* [*Hearings on Assembly Bills No. 16 and 115 and Senate Bill No. 50, supra* footnote 10, Nov. 24, 1958, at 44] (emphasis supplied).**

The manifestations of this responsibility have been insignificant such as the separate sections which the Authority devoted to "Suburban Transit" in its earlier Annual Reports (a practice by the way, which has been resumed since the Port Authority's acquisition of the H & M railroad in 1962). See T. W. Kheel & R. J. Kheel, "The Port Authority 1962 Covenant — Bar to Mass Transportation," 27 *Rutgers L. Rev.* 1, 5(1973); The Port of New York Authority, *Annual Report for 1923*, "Commuter Passenger Traffic," 35–36 (Jan. 19, 1924); *Annual Report for 1924*, "Congestion of Passenger-Traffic," 23–24 (Jan. 24, 1925); *Annual Report for 1929*, "Suburban Transit," 27–28 (Dec. 31, 1930). More indicative, however, of the Port Authority's

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[10]**See *Hearings on Assembly Bills No. 16 and 115 and Senate Bill No. 50 before N. J. Assembly Comm. on Fed. & Interst. Rels. and Assembly Comm. on Highways, Transp. and Pub. Utilities*, Nov. 24, 1958, at 18A (Statement of Augustus S. Dreier, Counsel, Inter-Municipal Group for Better Rail Service); Dec. 3, 1958, at 22–A (Statement of Herman T. Stichman, Trustee, Hudson & Manhattan Railroad) (hereinafter referred to as Assembly Hearings); *Caro, The Power Broker Robert Moses and The Fall of New York*, 922–23 (1974).**

role in rapid transit operations have been the infrequent reports which it has issued on this subject.[11] The representativeness of at least 14 of these reports cannot be premised on any successful projects which they have stimulated or realized. As frankly admitted by Edward J. O'Mara, a chairman of the Metropolitan Rapid Transit Commission (a Port Authority-funded investigative agency which itself produced an unsuccessful series of legislative proposals):

> For at least 35 years, there has been a growing public awareness of the importance of mass transportation in the metropolitan region in the State of New Jersey. At least 14 more or less extensive studies have been made of the problem by various committees and commissions. Nothing has ever come of them, and in the meantime the problem has been becoming progressively more acute. [*Assembly Hearings*, Nov. 24, 1958, at 70A]

See also *2d Hearing before N. J. Sen. Comm'n (Created un-*

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[11]These reports have been conducted on a variety of topics and in conjunction with various other interested organizations. Some, though by no means all, of these studies have included a continuing study begun in 1927 of the suburban transit facilities to relieve traffic congestion in conjunction with a variety of other groups (pursuant to New Jersey legislative authorization, *L.* 1927, *c.* 277); a 1937 study entitled "Suburban Transit for Northern New Jersey (Mar. 1, 1937) concerning interstate and suburban passenger problems within the Port District and New Jersey in particular (undertaken pursuant to *L.* 1936, *c. J. Res.* No. 6); a continuation of studies begun in 1937 and the presentation of legislative proposals for implementing a new transit system (pursuant to *L.* 1938, *c. J. Res.* No. 1); a 1948 study concerning the development of a rapid transit system in Northern New Jersey which would link Newark Airport and New York City (undertaken pursuant to a request by New Jersey Governor Alfred E. Driscoll); 1948 study concerning the development of a north-south transit line in Hudson County (initiated at the request of the City of Bayonne); and the creation in 1952 of the Metropolitan Rapid Transit Commission to undertake a comprehensive study of the transit problems of the Port District (*L.* 1952, *c.* 194). By agreement reached in 1955, the Port Authority provided $800,000 when this last study was inaugurated. The Commission's report was released in 1958. In addition, the Port Authority in the early 1960's conducted a series of studies concerning the feasibility of its acquiring the operations of the H & M railroad, and later, the conditions under which the authority would do so.

der Sen. Res. No. 7 (1960) and Reconstituted under Sen. Res. No. 7 (1961)) to Study the Financial Structure and Operations of The Port of New York Authority, Jan. 27, 1961 (2d day), at 64–66 (Statement of Austin J. Tobin, Executive Director, Port of New York Authority). In this respect, these studies provide a broad overview of the historic approach of the Port Authority to the problems of urban mass transit. This background is particularly important because what the Court is truly asked to consider is the manner in which the Port Authority has dealt with the problems of mass transit in the Port District, and the attitudinal reluctance which has characterized its efforts in this area of transportation.

These studies, in conjunction with the annual reports which are issued by the Port Authority, possess several characteristics worth noting. First, virtually none of the studies resulted from the Port Authority's own initiative. Most of the studies were the product of either legislative or other governmental requests for pertinent information and proposals. See footnote 11, *supra*. While the failure to take affirmative administrative or investigatory action may not necessarily be indicative of an agency's abdication of responsibility in the case of the Port Authority, the failing is particularly suspect. This is because the duties expressly imposed on the Port Authority by the 1921 Compact were those to "make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted;"[12] and to suggest to the state legislatures recommended means to improve Port commerce.[13]

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[12]*N. J. S. A.* 32:1–12, which was contained in the original Compact as Article XI and which is indicative of a statutory mandate, provides:

> The port authority *shall* from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two states, they shall be binding upon both states with the same force and effect as if incorporated in this agreement. [Emphasis supplied]

[13]*N. J. S. A.* 32:1–13 provides:

> The port authority may from time to time make recommendations to the legislatures of the two states or to the congress of the

Second, none of these studies contains an expressed commitment (much less a recommendation of such a commitment) by the Port Authority to undertake the construction or implementation of a mass transit system. Instead, most of them recommend the assumption of these obligations by other governmental or quasi-governmental bodies and agencies. See The Port of New York Authority, *Suburban Transit for Northern New Jersey,* 10 (1937); The Port of New York Authority, *Annual Report for 1958,* 38–42. In conjunction with this, it should be noted that the Authority was one of the staunchest supporters of two New Jersey legislative proposals, S–50 and A–115, which were introduced and discussed in 1958. See *Assembly Hearings, supra,* Nov. 24, 1958, at 44, 49 (Statements of Austin J. Tobin, Executive Director, Port of New York Authority). Not surprisingly both of these measures presented plans for the establishment of an independent agency to handle matters relating to mass transportation. Conversely, the Port Authority was strongly opposed to a companion proposal, A–16, which would have authorized the agency itself to develop, improve and coordinate the rapid transit facilities in the Port District. *Assembly Hearings, supra,* Nov. 24, 1958, at 18–19 (Statements of Austin J. Tobin, Executive Director, Port of New York Authority).[14]

United States, based upon study and analysis, for the better conduct of the commerce passing in and through the port of New York, the increase and improvement of transportation and terminal facilities therein, and the more economical and expeditious handling of such commerce.

[14]On this point, a noted transportation expert, Michael N. Danielson, observed:

A good many people in the New York area, particularly in New Jersey, could see no point in creating another agency, whether bi-state or tri-state, as long as the Port of New York Authority apparently possessed both the jurisdiction and financial capacity to tackle the regional rail problem. Time and again, the Port Authority fended off these forays, emphasizing that there was an "absolute incompatibility between railroad deficits and the PNYS'S contractual limitations with its bondholders . . . and to confine itself to self-supporting projects." [*Danielson, Federal-Metropolitan Politics and the Commuter Crisis,* 23 (1965)].

Finally, as previously noted, there has been a startling absence of tangible progress resulting from, or attributable to these investigatory efforts. This is true even though the Port Authority has recognized the commuter problems which beset the New York metropolitan area. As early as 1925, in its Annual Report, the Authority observed:

While hundreds of millions of dollars have been spent in urban rapid transit during the past decade, no commensurate amounts have been expended on suburban rapid transit, and the commuter has reached the limit of his endurance where the trunk lines leading into New York City are incapable of handling both suburban and through traffic. The passenger service of every railroad in the Port District is taxed to its limit by the requirements of this service. There is barely room during the rush hours for the trains carrying freight because of the commuter service, while passengers and freight must both necessarily move during these hours. [The Port of New York Authority, *Annual Report for 1924,* 23 (Jan. 24, 1925)]

See also The Port of New York Authority, *Annual Report for 1927,* 10, 53 (Jan. 20, 1928). Over the years, this recognition has increased with its realization of the expanding dimensions of commuter congestion and the inability of private transit facilities to cope with the problem. The Port of New York and New Jersey, 1972 *Annual Report,* 10–15 (1972); 1973 *Annual Report,* 10–15 (1973); 1974 *Annual Report,* 4–6 (1974).

The Port Authority's ineffectual investigative efforts cannot be justified due to a theoretical lack of jurisdiction in mass transit operations. Such jurisdiction was given to the agency in the Compact of 1921. Nor is the lack of success due to the financial inability of the Port Authority to assume additional obligations. As the trial court found, the Authority is not only financially sound, but has suffered no detrimental effects from the repeal of the protective 1962 Covenant:

Suffice it to say that between 1962 and 1974 the security afforded bondholders had been substantially augmented by a vast increase in Authority revenues and reserves, and the Authority's financial ability to absorb greater deficits, from whatever source and without any

significant impairment of bondholder security, was correspondingly increased. [134 *N. J. Super.* at 194–95]

Rather, the limited effectiveness of these studies is merely symptomatic of an underlying limitation which the Port Authority has imposed on its own involvement in mass transportation. This limitation, which is derived from a narrow construction of its statutory powers, precludes an undertaking by the Authority unless the relevant project will be financially self-supporting, or will only generate deficits within conservatively defined limits. While the definition of the limitation is presented in purely financial terms, its effect has been to severely restrict the scope of activities in which the agency may engage. Because the majority of mass transportation facilities are closely associated with high deficits, the practical operation of the Port Authority's self-imposed restriction has prevented the Authority from fulfilling its rapid transit obligations.

C. *History of the Self-Supporting Concept*

While the provisions of the Compact and Comprehensive Plan sketched a broad authorization in terms of the activities which were within jurisdiction of the Port Authority, the powers accorded to it were not commensurate with its tasks. Without the necessary power, the Authority could not unilaterally support its statutory mandates, much less initiate action in their behalf:

An impressive body of activities was thus laid out wherein the Port Authority could formulate the needs of the port as a whole and be vigilant to protect its interests. It would serve as a focus and agent of the forces of unity within the port. The primary requirement in this field would not be legal power but adequate funds and continuous application. The Port Authority never lacked support with respect to the former, and was well conceived to function with respect to the latter. But success along this line of endeavor would depend upon cooperation from public agencies and private interests. Where conflicts developed it could make progress very slowly, if at all. [*Bard, supra*, footnote 2, at 58–59]

As a result of setbacks incurred in early legal skirmishes with the powerful railroads in the 1920's, the Port Authority appeared to assume a less assertive role in the port's development than that anticipated by its proponents. Reluctant to promote otherwise desirable activities within the Port District, the Authority restricted its goals to the dubious task of maintaining a balanced budget. The difficulty of this objective was compounded by the fact that under both the Compact and the Comprehensive Plan, the Port Authority had been denied the power to either levy assessments or pledge the credit of either state. *Annual Report for 1954,* vi (1954). Consequently, to offset the costs and losses which it incurred, the agency was dependent upon the revenues which it realized from its various projects and facilities.

While this new objective in the early years of the Port Authority was tempered by a "rule of economic practicability," The Port of New York Authority, *Annual Report for 1926,* 5 (Jan. 20, 1927), its importance was later elevated by the increased emphasis placed on self-sufficiency. In other words, because the fiscal stability of the Port Authority was dependent upon the revenues of its facilities, it was necessary for all projects to demonstrate their self-supporting capacity before the Authority would undertake their implementation. Thus, James C. Kellogg, III, the then Vice-Chairman of the Port Authority, read from a prepared statement before a Senate Commission in 1960, as follows:

In order that the Port Authority might carry out the tremendous and continuing task of developing the public terminal and transportation facilities of this metropolitan area, the two Legislatures clothed it with all necessary and appropriate powers of port and terminal development, with the important exception of the power to tax or to levy assessments. This reservation is the key to the whole concept of the Port Authority, which is that of a self-supporting agency, whose public projects are carried on through the development of their own revenues and charges, and which imposes no burdens on the general taxpayer. [*Hearings before N. J. Sen. Comm'n Created under Sen. Res. No. 7 (1960) to Study the Financial Structure and Operations of the Port of New York Authority*, September 27, 1960, 7–8 (Statement of James C. Kellogg, III, Vice-Chairman of the Port Authority)].

The objective of a self-supporting authority, while salutary in principle, was inconsistent with the Port Authority's original objectives and early history. In its annual report for 1924, the Authority explicitly rejected the self-supporting concept as a basis for its operations:

> **Preferably, and in the main, therefore, the Port Authority regards itself rather as the guardian and guide of the Port District, protecting it against attacks both from within and without, and directing its activities and developments with a view to procuring the greatest cooperation of existing agencies, the utmost efficiency and the minimum of cost. *If such is to be its primary function it should not be expected to be self-supporting.* [The Port of New York Authority, *Annual Report for 1924*, 9–10 (Jan. 24, 1925); emphasis supplied]**

Moreover, the self-supporting concept as a fundamental precept of the Port Authority's financial scheme is belied both by the projects which it embarked upon after its creation and by subsequent developments in its financial structure. As the trial court observed, because of the heavy investment required by these early projects, the Port Authority was confronted with large deficits from the outset. 134 *N. J. Super.* at 140. However, rather than restricting the Authority's activities, New Jersey and New York encouraged such projects by advancing funds, transferring control of lucrative facilities (such as the Holland Tunnel) to the Authority, and permitting the Authority to issue "open-ended" bonds. This latter device, in particular, helped free the Port Authority from absolute reliance on self-supporting projects. By placing all revenues derived from the sale of open-ended bonds into a common fund, the Port Authority was able to free deficit operations from the inadequate sales of their particular bonds. *Goldberg, A History of the Port of New York Authority Financial Structures*, 5 (1964). The pooling of resources not only permitted the Port Authority to finance debt-ridden facilities through those which were profitable, but simultaneously afforded bondholders a certain degree of security regardless of the success or failure of any given project. The open-ended financing of the Port

Authority, which was originally introduced in the form of the General Reserve Fund (*N. J. S. A.* 32:1–142), literally, the pool into which all funds were paid, was later expanded by the Authority's adoption of the Consolidated Bond Resolution in 1952. This resolution, which abandoned the practice of earmarking funds for specific projects, authorized the issuance of bonds whose revenues would be designated by the Authority for a given project according to its needs. As the trial court found, the resolution obviated any further concern for maintaining the self-supporting concept as a prerequisite to Port Authority involvement in a project:

> **With the adoption of the CBR the "self-supporting" facility concept which had governed earlier authority financing ceased to have the significance previously attached to it; for under the CBR the Authority's financial structure is based on a unitary enterprise concept and all revenues from all facilities are pooled. Individual facilities are not financed independently of the rest of the Authority. The facilities contribute their revenues for debt service on all Authority bonds according to their earning power and without regard to the amount of bonds issued for the construction of any particular facility. [134 *N. J. Super.* at 143]**

Enactments such as the General Reserve Fund and the Consolidated Bond Resolution created the possibility for the involvement of the Port Authority in traditionally deficit operations such as mass transportation. Nonetheless, the translation of this new financial freedom into practical action was not forthcoming from the Port Authority:

> **That cashbox, so long empty, was full now, thanks to the postwar traffic boom, . . . the Port Authority's was worth $700,000,000. Long on cash, moreover, the Port Authority was short on dreams. The visionaries who had created it were long gone from its councils; Julius Henry Cohen had been replaced by money men like Cullman and Colt and Pope whose eyes were brightened by the balances in the Authority's ledgers, not by the potentialities for improving the common weal that those balances represented. The purpose for which the Authority had been created — the development of an *overall* transportation system to knit together a great port — had been lost sight of for years. Plans the Authority had aplenty, of course, but unrelated plans, plans for individual projects, joined by no link other than the fact that their construction would return the agency profit. [*Caro, supra*, footnote 10, at 922–23]**

The resultant program which the Port Authority pursued represented less of an integrated effort to organize and coordinate the commerce of the port of New York, and more of an administrative mish-mash with little cohesiveness or relation to the agency's statutory mandate. Thus, construction of a World Trade Center, with little or no relation to the activities for which the Port Authority was created, was suddenly elevated to an importance which transcended that of a more traditionally-regarded responsibility of the Authority such as mass transportation.

The underlying rationale for these actions was unmistakably attributable to retention of the self-supporting limitation to which the Port Authority had previously adhered. This was made clear by Executive Director Tobin of the Port Authority when questioned at a 1958 hearing about the manner in which future revenues and reserves would be committed:

> **Well, it is closed unless those future bond issues have to do with projects that can be made self-supporting and in which the Commissioners of the Port Authority will not only certify as *a matter of conscience* and a matter of record that they believe that they can be made self-supporting and will add to the general credit of the Port Authority; but also if they can demonstrate arithmetically on sound projections of its existing net revenues and its maximum future debt service that those projects will not hurt this bondholder. That's all he has. If that bondholder has an open end bond without those restrictions, he has a piece of paper. [*Assembly Hearings, supra*, November 24, 1958, at 38 (Statement of Austin J. Tobin, Executive Director, Port of New York Authority); emphasis supplied]**

This self-limitation has exacerbated the Port Authority's demonstrated lack of initiative. For example, although the Port Authority in 1955 agreed to provide the Metropolitan Rapid Transit Commission with $800,000 for that body's study of a metropolitan scheme of mass transit, the price which the Authority extracted for its financial support was a "Memorandum of Understanding" which precluded its own role in any deficit operations which the Commission

might recommend. *Danielson, supra* at 23; *Assembly Hearings, supra*, December 3, 1958, at 91–A to 92–A (Statement of Frank H. Simon, Executive Director, Metropolitan Rapid Transit Commission). More importantly, perhaps, the Port Authority's inertia has interjected itself in the relationship between the agency and the Legislatures which it allegedly serves. This has been done in an often contradictory fashion as illustrated by the following discussion between Assemblyman Crabiel and Executive Director Tobin:

> **ASSEMBLYMAN CRABIEL: What I'm getting at here is, you're saying categorically that you cannot take a deficit. Now, I'm raising the point that as far as the Legislatures of the two states, when they established the compact there was nothing in the compact and nothing in the instructions from the Legislatures to the Port Authority that they could not undertake a deficit operation.**
>
> **MR. TOBIN: Well, excuse me, sir. I'd say that there was. I would say that the way the statutes are phrased, it could undertake nothing except a self-supporting operation. We have no way of financing anything but a self-supporting operation.**
>
> **ASSEMBLYMAN CRABIEL: Well how do you account for the fact, then, that you have operated deficit operations?**
>
> **MR. TOBIN: Because the pooled revenues have been sufficient. Because we believed also, when we went into those, that they could be self-supporting and we were wrong.**
>
> **ASSEMBLYMAN CRABIEL: That's what I was pointing up. [*Assembly Hearings, supra*, November 24, 1958, at 45]**

III

THE ROLE OF THE PORT AUTHORITY

Ultimately, those who are most hurt by the Port Authority's failure to enter the field of mass transportation are, of course, the commuters. Absence of Port Authority initiative in this area is a direct reflection of the deficits which are inherent in the provision of this public service:

> **Until the late 1950's, transit operations in the United States were generally profitable and, consequently, attractive to investment. Decline in patronage and increasing labor and equipment costs have completely reversed this trend to a point where today, public transit in its everyday operations in most cities is a losing proposition. The losses are not as great as sometimes presumed but, in most**

cases, average between 20 and 25 percent annually. Therefore, public transit — like many other sectors of the transportation industry, including private automobile transportation — now requires substantial public support in the form of direct financial subsidies to be capable of rendering necessary services. [Roeseler and Levi, "State Subsidies for Public Transit: An Overview of Current Legislation," 4 *Urban Lawyer* 59, 60 (1972)]

See also Kneafsey and Edelman, "A Market-Oriented Solution to the Northeast Railroad Dilemma," 41 *I. C. C. Pract. J.* 174 (1973–74). This problem concerning the financial weaknesses of mass transit facilities has been realized within the New York metropolitan area. This, no doubt, has resulted from both the unusually heavy demands which have been placed on these systems in the Port District, and the lack of a perceived common interest among the District's geographic and political components. *Danielson, supra,* at 21–22.

The Port Authority's failure to assume an active role in solving this problem has had a concurrent effect on the traveling habits of the average commuter. Faced with increasing service cutbacks and escalating fares, the commuter is left with fewer alternatives to the private automobile. Grubb, "Urban Transportation Alternatives to the Automobile," 39 *I. C. C. Pract. J.* 19 (1971–72); Cooper, "Prospects for a Mass Movement to Public Transit," 5 *Urban Lawyer* 679 (1973). His increasing resort to this mode of transportation in turn has caused a drastic increase in traffic congestion and air pollution which are commonly associated with the metropolitan area.

These problems have stimulated legislative responses on both the federal and state levels. The federal response consists primarily of the Urban Mass Transportation Act of 1964, 49 *U. S. C. A.*, § 1601 *et seq.*, which purports to encourage "the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private." 49 *U. S. C. A.*, § 1601. See Haley and Watkins, "The Urban Mass Transportation Assistance Act of 1970 — A Federal Program Comes of Age," 16 *N. Y. Law For.* 741 (1970). As a corollary to the urban mass transit crisis, the federal government has enacted the Clean Air Act, 42 *U. S. C. A.*, § 1857 *et seq.* Similar considerations produced comparable legislation in New Jersey, Emergency Energy Fair Practices Act of 1974, *L.* 1974, *cc.* 2, 6; Executive Order No. 1 (Feb. 5, 1974).

These legislative enactments were most recently recognized in a report issued by the Joint Transportation and Communications Committee of the New Jersey Legislature. *Report of the Senate and General Assembly Joint Transportation and Communications Committee (Pursuant to Assembly Concurrent Res. No. 211 of 1974)*, October 6, 1975. As the report noted:

The legislation passed by New Jersey during the last four years clearly reflects the determination on the part of its officials to direct the Port Authority towards making a greater financial commitment to mass transit. In order to determine whether New Jersey has been treated by the Port Authority in a fair and impartial manner the Committee has investigated the degree of Port Authority responsiveness to meeting the mass transportation needs of the State. [*Id.* at 13]

The Committee's conclusion was succinct as it was unfortunate:

The Committee recognizes that the Port Authority has acquired a reputation for its engineering, planning and management skills. It is the conclusion of the Committee, however, that in the area of mass transportation the Port Authority's performance has not been satisfactory. [*Id.* at 17]

The Committee's conclusions were premised upon the same type of factors which I have considered above. While the Committee was hopeful that the Port Authority would take its mass transportation responsibilities "more seriously" in the future, it nonetheless pledged "its vigilance to see that the

Port Authority completes the mass transportation projects it has promised to complete." *Id.* at 18, 19.[15]

The sensitivity of the state government to the urgent need for more modern means of public transportation has not been confined to the legislative branch. In his recent "State of the State" address, Governor Byrne not only recognized this problem, but concurrently cited the Port Authority's responsibility for its solution. Perhaps even more important, the Governor indicated his willingness to impose an affirmative sanction on the Port Authority should the desired action in the area of mass transit not be forthcoming:

> **How do we keep the railroads running at a time when the state subsidy program costs over $100 million a year and has been growing by more than 35 per cent a year? Should there be an overall operating agency for these lines? What about the communities and industries served by lines soon to be abandoned? Where can we find the $255 million required to match federal funding for the**

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[15] While the history of the Port Authority's involvement in mass transportation has been discouraging, the prospects for renewed efforts by the agency in this area of endeavor are hopeful. In the above cited report by the Legislature's Joint Transportation and Communications Committee, the development of a mass transportation plan by the Port Authority was noted. *Report of the Senate and General Assembly Joint Transportation and Communications Committee* (*Pursuant to Assembly Concurrent Res. No. 211 of 1974*, 16–17 (October 4, 1975)). This plan committed the Port Authority to the provision of additional direct rail service to Penn Station in New York City for New Jersey commuters, the expansion of the Midtown Bus Terminal, the construction of a rail link to Kennedy Airport and the extension of the PATH system from Newark to Plainfield. Although the Urban Mass Transportation Administration on December 19, 1975 rejected New Jersey's request for $278-million to construct the PATH extension, the State's expressed intention to reapply for such funds will create the possibility of a continued role for the Port Authority in mass transportation. *The Sunday Star-Ledger*, December 21, 1975, at 1, 8; *The New York Times*, December 22, 1975, at —; *The New York Times*, January 4, 1976, at 34. This persistence has apparently been successful as federal approval of a $400-million block grant for the PATH extension to Plainfield and other mass transit projects is anticipated. *The Star-Ledger*, February 10, 1976, at 1.

> **modernization of two major commuter lines and the extension of PATH to Plainfield?**
>
> **The Port Authority of New York and New Jersey must increase its commitment to these efforts. If it is unwilling to do so, we will insist that it rescind the toll increases instituted last year for the specific purpose of funding improvements in the public transportation system. [Annual Message of Governor Brendan T. Byrne, Jan. 13, 1976, at 19]**

I, too, would similarly take this opportunity to demonstrate the vigilance which has motivated the Joint Committee and the Governor. The Port Authority has too long neglected the responsibility with which it was statutorily charged in 1921. In *So. Burlington Cty. NAACP v. Tp. of Mt. Laurel*, 67 *N. J.* 151, 189 (1975), we recognized the significance of transportation to the overall development of an urban area. I would today reaffirm this significance.

IV

CONCLUSION

The relief which I recommend today is intended as an answer to a problem which has assumed crisis proportions. The Port Authority is the producer, the director and the main character of the play known as "The Disease of Mass Transportation." This malady has suffered too long from the benign neglect of public agencies such as the Port Authority, and such neglect has permitted the disease to spread unattended. The resulting state of affairs may most accurately be described as one of emergency. While the appellation "emergency" was at one time reserved for calamitous and natural occurrences, the inadequate and deteriorating quality of mass transit in the metropolitan area has had an eroding effect on the urban environment in which it operates. This effect has been measurable not only in terms of the unending lines of commuters who have been inconvenienced by inefficient service, but also in terms of traffic congestion with its attendant pollution as well. The courts of this country have long recognized that such emergent circumstances may

serve as a mandate to administrative action. "While emergency does not create power, emergency may furnish the occasion for the exercise of power." *Home Building & Loan Ass'n v. Blaisdell,* 290 *U. S.* 398, 425–26, 54 S. Ct. 231, 235, 78 *L. Ed.* 413, 422 (1934); *Hourigan v. North Bergen Tp.,* 113 *N. J. L.* 143, 148 (E. & A. 1934).

For an Authority that is long on cash and short on dreams,[16] it is time to respond for those who have long suffered the inconvenience and expense which have resulted from the Port Authority's inaction.

I would order the Port Authority, its Commissioners and its Executive Director to not only complete those projects to which it is already committed, but to formulate and present plans and suggestions for a regional mass transportation scheme to the Legislatures of New York and New Jersey. Implicit in this would be the requirement that such efforts be completed in an expeditious fashion and within a fixed period of time. This injunction is necessary to bring home the importance of Authority action in the face of the current transportation crisis.

In proposing this relief, I should not be understood as advocating usurpation of the functions of either the executive or legislative branches of government. The majority's characterization of my position is in error. (At 259). My disposition does not contemplate ordering either the Governors or the Legislatures of the States of New Jersey and New York to undertake any particular course or courses of action. I would be loathe to intrude upon the relationships which have developed between these other branches of state government and the Port Authority. Nonetheless, I am all too aware of the fact that expertise in the field of mass transit operations resides in the body which was originally vested with both power and jurisdiction in that area, namely the Port Authority. By according the Authority a statutory mandate to

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[16] *Caro, supra, footnote* 10 at 922.

undertake mass transportation projects, it was anticipated by both States that the Port Authority would actively research, promote and recommend projects to be authorized and implemented by the State Legislatures. It is precisely the Port Authority's reluctance to utilize its expertise that has frustrated this basic first step towards the development of a much-needed integrated mass transportation system in the metropolitan area. Therefore, I would order the Port Authority to proceed with this initial planning stage, while, at the same time, acknowledging that ultimate adoption and implementation of the resultant plans remain a legislative and executive prerogative. The declared willingness of those branches of government to adopt appropriate measures leaves me confident that only timely suggestions by the Port Authority are needed to point the direction towards improved mass transit operations.

Although I am unsure whether it is the perception of my suggested order as a usurpation of executive and legislative function which underlies the majority's disagreement with such relief, I am, nonetheless, clear in my opposition to the lesson in civil procedure which the majority would impose on this case. I find that the majority's exercise of power under a writ of *mandamus* would ill-befit a remedy with such a Marshallian association. *Marbury v. Madison,* 5 *U. S.* (1 Cranch) 137, 2 *L. Ed.* 60 (1803). This is a direct result of not only the restrictive but the erroneous construction which the majority gives to the powers implicit in a *mandamus.* The writ of *mandamus* is a remedial process whose essential function is to compel the performance of a ministerial action *or the exercise of a discretionary function. Roberts v. Holsworth,* 10 *N. J. L.* 57 (Sup. Ct. 1828); *Switz v. Middletown Twp.,* 23 *N. J.* 580 (1957). This mode of relief is particularly appropriate with regard to recalcitrance by public officials or authorities. *Bd. of Taxation v. Belleville,* 92 *N. J. Super.* 338, 340–41 (Law Div. 1966). While the court has the power under a *mandamus* to compel action, it does not similarly have the power to control discretion in the performance of

the designated action. Such discretion properly resides in the functioning authority.

By its construction of the *mandamus,* the majority would not only accord the authority discretion in the manner of performing the compelled action, but would permit the authority discretion as to whether the ordered action should be performed at all. Although the majority has recognized that the Port Authority has resisted efforts to promote its involvement in mass transportation, it would consider this to be an exercise of discretion which would preclude a *mandamus* or an order similar to the one which I have suggested:

> As we have sought to demonstrate, the circumstances before us do not at all invite or accommodate the remedy proposed. This is so because the Authority (whose function is clearly not ministerial) has in fact exercised its discretion, even though that exercise has resulted in the rejection of a policy favoring mass transportation. Being a judgment decision its wisdom may be open to dispute; but as to the propriety of this Court's refusal to intrude on the underlying policy determination, there can be no question in the circumstances before us [At 259].

I cannot subscribe to such reasoning, whose circular nature would undercut the relief which the majority otherwise feels warranted under the circumstances and which would effectively emasculate the *mandamus,* or any similar relief, as a remedy.

I reject the majority's approach to the problem of this case within a procedural context. We have been taught that there are no rights without remedies. By stripping us of our remedies, the majority is most assuredly divesting us of our rights. *Marbury v. Madison, supra,* 5 *U. S.* (1 Cranch) at 163, 2 *L. Ed.* at 69. Furthermore, we have long passed the days wherein cases were decided on the niceties of procedural technicalities. *Hodgson v. Applegate,* 31 *N. J.* 29, 43 (1959); *Edelstein v. Asbury Park,* 51 *N. J. Super.* 368, 385 (App. Div. 1958). There is no need to resurrect in this case another of these manifestations of by-gone days.

Even if I were to acknowledge the necessity of specifically resorting to a *mandamus* or its equivalent, I could not justify withholding such relief in this case; nor can I presently understand the distinction which the majority draws between the *mandamus* which they recommend and the order which I propose. Granting that mandamus is an "extraordinary remedial process," *Beronio v. Pension Comm'n of Hoboken,* 130 *N. J. L.* 620, 623 (E. & A. 1943), aff'g 129 *N. J. L.* 557 (Sup. Ct. 1943), I cannot see the unfortunate plight of the more than 30 million commuters who are dependent upon the Port Authority's transportation services annually, nor the Authority's benign neglect of their plight, as being anything less than extraordinary. This is particularly so where to adopt the majority's approach would permit the Port Authority to ignore the statutory responsibilities with which it was charged in 1921.

The majority in *Gaby v. Port of New York Authority* has been unwilling to take the action which I regard as imperative. From its disposition I must, therefore, respectfully dissent.

For affirmance—Justices MOUNTAIN, SULLIVAN and CLIFFORD and Judges CONFORD, CARTON and HALPERN—6.

Concurring in part and dissenting in part—Justice PASHMAN—1.

Decision of the Superior Court of New Jersey, Law Division, Bergen County

UNITED STATES TRUST COMPANY OF NEW YORK, ETC., PLAINTIFF, v. THE STATE OF NEW JERSEY, *ET AL.*, DEFENDANTS .

DANIEL M. GABY, PLAINTIFF, v. THE PORT OF NEW YORK AUTHORITY, *ET AL.*, DEFENDANTS.

Superior Court of New Jersey
Law Division

Argued April 8, 9, 1975—Decided May 14, 1975.

SYNOPSIS

Consolidated actions were brought concerning constitutional validity of legislation creating, and later repealing, a covenant between the States of New Jersey and New York and holders of bonds issued by the Port Authority of New York and New Jersey. Defendants filed counterclaim for declaration of validity of repealing legislation. The Superior Court, Law Division, Gelman, J. S. C., held that legislative enactments, such as the 1962 covenant whereby the States and Authority were precluded from applying Authority revenues and reserves for passenger railroad purposes unless permitted by criteria set forth in the covenant, can constitute a contract within meaning of the contract clauses of the State and Federal Constitutions, that not every impairment of a contract obligation or security for its performance runs afoul of the contract clause, that a State's inherent power to protect the public welfare may be validly exercised under the contract clause even if it impairs a contractual obligation so long as it does not destroy it, and that in view of emergent problems of air pollution, crises in mass transit and energy problems repeal legislation was a reasonable and valid exercise of the State's police power and was not prohibited by the contract clause of either the Federal or State Constitution.

Complaints dismissed; judgment for defendants on counterclaim.

Mr. Robert B. Meyner and Mr. Devereux Milburn (of the New York Bar) for plaintiff United States Trust Company (*Messrs. Meyner, Landis & Verdon,* attorneys; and *Messrs. Carter, Ledyard & Milburn,* attorneys; and *Mr. Donald J. Robinson* (of the New York Bar) *Messrs. Hawkins, Delafield & Wood,* attorneys).

Mr. Michael I. Sovern (of the New York Bar) and *Mr. Murray J. Laulicht,* special counsel for defendants (*Mr. William F. Hyland,* Attorney General of New Jersey, attorney; *Mr. Harold S. H. Edgar* (of the New York Bar) on the brief).

Mr. Theodore W. Kheel (of the New York Bar) and *Mr. Howard Stern* for plaintiff Daniel M. Gaby (*Messrs. Battle, Fowler, Stokes & Kheel,* attorneys, and *Messrs. Shavick, Stern, Scholz, Steiger & Croland,* attorneys).

Mr. Joseph Lesser (of the New York Bar) for defendant Port Authority of New York and New Jersey (*Mr. Francis A. Mulhern,* attorney); and *Mr. Patrick J. Falvey* (of the New York Bar). *Ms. Isobel E. Muirhead, Mr. Arthur P. Berg* (of the New York Bar), (*Mr. Vigdor D. Bernstein,* of counsel).

GELMAN, J. S. C. These are consolidated actions which have as their common subject matter the constitutional validity of legislation of this State creating, and later repealing, a covenant between the States of New Jersey and New York and the holders of bonds issued by the Port Authority of New York and New Jersey (Port Authority).[1] The

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[1]Under the terms of the Compact of 1921 creating the Port Authority, *N. J. S. A.* 32:1-1 *et seq.*, legislative action taken by one state

first legislative act in question, *chapter* 8 of the *Laws of* 1962, *N. J. S. A.* 32:1–35.50 (the 1962 covenant), authorized the Port Authority to construct the World Trade Center and to acquire and operate the Hudson & Manhattan Railroad Company. As part of the 1962 legislation the two States enacted a statutory covenant with each other and with the holders of certain Port Authority bonds whereby the States and the Port Authority were precluded from applying the Authority's revenues and reserves for passenger railroad purposes unless permitted by the criteria set forth in the statute. *N. J. S. A.* 32:1–35.55.

The 1962 covenant was repealed by chapter 25 of the *Laws of* 1974.[2] The complaint filed by the United States Trust Company challenges the constitutionality of the repeal act of 1974, and the Gaby complaint attacks the validity of the 1962 covenant. We turn, then, to the procedural history of these actions and the issues projected by the respective pleadings.

Procedural History

1. *The Gaby Action*

On May 16, 1972 plaintiff Daniel Gaby filed a class action complaint for a declaratory judgment that the 1962 covenant violated the Federal and State Constitutions. The complaint named as defendants the Port Authority, its commissioners and executive director, and the then Governor of New Jersey, William T. Cahill. On October 25, 1972, on

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affecting the powers and duties of the Port Authority is not effective until concurred in by the legislature of the other. *N. J. S. A.* 32:1–8. Statutory citations in this opinion will be limited to the applicable New Jersey statutes unless the context otherwise requires.

[2]In 1972 the Legislature had repealed the 1962 covenant as to all bonds of the Authority issued after the effective date of the act. *L.* 1972, *c.* 208; *N. J. S. A.* 32:1–35.55a. The act became effective upon the adoption of concurrent legislation by the State of New York on May 10, 1973. *Laws of N. Y.* 1973, *c.* 318. The validity of this legislation is not in issue in these proceedings.

the motion of the Attorney General of New Jersey, the complaint was dismissed as to former Governor Cahill. The Attorney General also moved to dismiss the complaint for failure to name as an indispensable party the Port Authority's bondholders. No disposition appears to have been made of the motion at that time.

The Gaby complaint alleges, among other things, that the residents of the State of New Jersey are dependent upon mass transit facilities and are adversely affected by the deterioration of such facilities within the District serviced by the Port Authority (the Port District). It is alleged that the Port Authority was created by the Compact of 1921 and consented to by the United States Congress[3] to assure "cooperation of the two states in the future development" of transportation facilities within the Port District, and that by virtue of the 1962 covenant, restricting the Port Authority's power to acquire or operate passenger rail transit facilities, the two states entered into a new "Compact" without the consent of Congress and in violation of *U. S. Const.*, Art. 1, § 10. The complaint further alleges that the 1962 covenant constitutes an unconstitutional surrender by the State of its sovereign powers "to protect the health, general welfare and safety of the people," and that it has impaired and obstructed existing facilities for the transportation of goods in interstate commerce, in violation of *U. S. Const.*, Art. 1, § 8.

Gaby asks for multifarious relief. Aside from seeking a declaration as to the unconstitutionality of the 1962 covenant, he asks the court to declare the covenant to be subject to repeal, and to direct the Port Authority to formulate and submit to the court a plan for the development of mass transit facilities within the Port District.

The Gaby action was pretried on February 22, 1973, at which time it was stipulated that the action could proceed

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[3]*Pub. Res. No.* 17, 67th Cong., 1st Sess. (42 *Stat.* 174).

as a class action without formal notice to the class represented by plaintiff. Thereafter both sides moved for summary judgment, and oral argument on the motions was heard on September 26, 1973. At the conclusion of the argument the court directed the parties to submit further briefs on the constitutional issues and on the question whether the bondholders were necessary parties to the Gaby action. Following conferences between counsel and the court, it was agreed the United States Trust Company should be permitted to intervene in the Gaby action as a party defendant to represent the interests of the bondholders in that action. An order to such effect was entered on December 18, 1973, and arguments were rescheduled on the motions for summary judgment.

Prior to the date fixed for the argument the prospects for the adoption of the repeal act became apparent, and further action in the Gaby case was stayed pending future legislative developments.

2. *The United States Trust Company Action*

The New Jersey Legislature completed action on the repeal act on April 22, 1974, and Governor Brendan T. Byrne signed the bill into law on April 30, 1974. On the same day United States Trust Company (U. S. Trust) filed its complaint on behalf of itself as the holder of Port Authority bonds, as trustee for certain designated issues of Port Authority bonds, and on behalf of all holders of consolidated bonds issued by the Port Authority. The complaint names as defendants the State of New Jersey, Governor Byrne and the Attorney General of New Jersey, and seeks a declaratory judgment that the repeal act violated the Federal and State Constitutions.

U. S. Trust alleges that it is the holder (for its own account and in a fiduciary capacity) of $96,000,000 of consolidated bonds issued by the Port Authority; that the Port Authority was intended, under the terms of the Compact approved by Congress, to be a self-supporting public

agency whose obligations were to be and are payable from its net revenues and certain reserve funds; that the 1962 covenant was enacted to protect the Port Authority's existing and future bondholders from the diversion of pledged revenues and reserves to finance deficit mass transit facilities and further to preserve the Port Authority's credit standing; that the Port Authority notified prospective purchasers of its bonds of the existence of the 1962 covenant and purchasers relied on the covenant in purchasing bonds issued by the Port Authority, and that the secondary market for the Port Authority consolidated bonds has been adversely affected by the repeal act.

The complaint alleges that the repeal act violates the "impairment" and "taking" provisions of the Federal Constitution, *U. S. Const.*, Art. I, § 10 and Amends. V and XIV, and the equivalent provisions of the New Jersey Constitution, *N. J. Const.* (1947), Art. IV, § VII, par. 3; Art. I, pars. 1 and 20.

The answer filed by defendants asserts several defenses among which the following may be briefly noted: (1) the repeal act constitutes a reasonable exercise of the police power by the State; (2) the 1962 covenant itself violated the Federal Constitution because of lack of congressional consent; (3) the repeal act does not constitute an "impairment" of the contract since the obligation of the Port Authority to pay its bondholders remains intact; (4) the bondholders were on notice of the reserved powers of the State to repeal the 1962 covenant, and (5) the repeal act was adopted as a police power measure to meet a transportation crisis affecting the health, safety and welfare of persons residing within the District. Finally, the answer asserts a counterclaim for a declaratory judgment that the repeal act is constitutional.

A consent order was entered pursuant to *R.* 4:32–1 in the U. S. Trust action directing that the action be maintained and defended as a class action by U. S. Trust on

behalf of all holders of consolidated bonds of the Port Authority, and that notice to the class be deemed to have been given by means of the media publicity which was disseminated when the action was instituted. On December 10, 1974 the Gaby and U. S. Trust actions were consolidated by order of the court.

The parties to the U. S. Trust action have filed a 366-page stipulation of facts, accompanied by exhibits covering all phases of the case with the exception of two issues: (1) whether the purchasers of consolidated bonds issued by the Port Authority after the adoption of the 1962 covenant relied in fact upon the existence of the covenant, and (2) whether the repeal of the 1962 covenant adversely affected the secondary market for Port Authority bonds. These issues were the subject of a trial on February 4, 5, 6, 7 and 11, 1975, and the court's findings on the issues will be set forth *infra*.

The Formation, Facilities and Financial Structure of the Port Authority.

1. *Formation and Facilities.*

In 1917 the States of New Jersey and New York established the New York, New Jersey Port and Harbor Development Commission (the Commission) to study the facilities and problems of the Port of New York and to recommend a plan for the future development of the Port.[4] The Commission filed its *Report*[5] on December 16, 1920

[4]The enabling legislation directed the commissioners to negotiate and agree upon a joint report recommending a policy for the states "to the end that said port shall be efficiently and constructively organized and furnished with modern methods of piers, rail and water and freight facilities * * *." The Commission was to work out "a comprehensive and adequate interstate and Federal port policy, to meet commercial needs in times of peace and the protection of the harbor and adjacent localities in times of war." *L.* 1917, *c.* 130.

[5]*Joint Report with Comprehensive Plan and Recommendations*, New York, New Jersey Port and Harbor Development Commission, 1920 (hereafter cited as the *Report*).

setting forth its findings, conclusions and recommendations. The core recommendation of the Commission was the creation by the two states of a common public agency by means of which the states would cooperate in the future development of the facilities of the Port in accordance with the comprehensive plan recommended by the Commission.[6] *Report* at 436. In discussing the legal precedents for the establishment by the States of an agency having a substantial impact on interstate commerce, the *report* stated:

> Permissive or restrictive, as the case may be, the power of Congress over the instrumentalities of interstate traffic is exclusive, when in a specific case it has been exercised. But this latter limitation, coupled with the broad police power of the State and its control of intrastate commerce, has left to New York and New Jersey a broad field within which they may act without express Federal consent. It is hoped, of course, by securing congressional approval of any plan which may be adopted, to avoid future conflict with the Federal authority over interstate unification and control of the Port. But for the present the States may act alone. [*Report* at 446]

Prophetically the Commission noted that

> [o]ur port problem is primarily a railroad problem. * * * Therefore the comprehensive plan to evolve which this Commission was created is essentially a railroad plan. With the proper network of rail facilities, the development of other terminal facilities can follow along rational lines * * *. A complete reorganization of the railroad system is the most fundamental physical need of the Port of New York. [*Report* at 3]

However, the railroad problem upon which the Commission focused was not that of passenger transit but the handling and distribution of freight and cargo into and out of the Port District, and the comprehensive plan recommended by the Commission addressed itself exclusively to the transportation and distribution, not of persons but of freight

[6]The recommendation for a Compact between the States was originally contained in the Commission's preliminary report submitted in 1918.

and cargo by rail, and to a lesser extent by ship and motor truck. In its 474 pages plus appendices the only significant discussion of passenger traffic in the *Report* is contained in the section dealing with ferries and vehicular tunnels. After noting that the bulk of interstate passenger traffic was accommodated by the Hudson River ferries and that the impact of the Holland Tunnel (started in 1920) could not be forecast, the *Report* opined:

> **Vehicular tunnels offer little promise as a means of conveying passengers, and the one rapid-transit facility in existence between the two States, while operated to near capacity, is not sufficiently profitable to warrant optimism that others will be built. [*Report* at 330]**

Following the submission of the Commission's *Report*, the Port of New York Authority[7] was created pursuant to an interstate compact, signed April 30, 1921, between the States of New Jersey and New York. *N. J. S. A.* 32:1–1 *et seq.* The consent of Congress "to each and every part and article" of the Port Authority Compact was obtained effective August 23, 1921. *Pub. Res. No.* 17, 67th Cong. 1st Sess. The preamble of the Port Authority Compact states that "a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey," and that "the future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money, and the cordial co-operation of the States of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans."

Article I of the Compact contains the agreement and pledge by the two states of their "faithful co-operation in

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[7]The name of the Port of New York Authority was changed to the Port Authority of New York and New Jersey on July 1, 1972. *N. J. S. A.* 32:1–4.

the future planning and development of the port of New York, holding in high trust for the benefit of the nation the special blessings and natural advantages thereof". Article II defines the Port of New York District, comprising an area of about 1500 square miles in both states within a radius of about 25 miles from the Statue of Liberty. Article III establishes the Port Authority as "a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other, or by act or acts of congress." Article VI vests in the Port Authority "full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within [the Port] district"; to make charges for the use of such facilities, and "to borrow money and secure the same by bonds or by mortgages upon any property" held by the Port Authority. Article VII provides that the Port Authority "shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other," and mandates that the Port Authority shall not pledge the credit of either State except with the consent of its legislature. Article XI requires the Port Authority to make plans for the development of the Port District supplementary to or amendatory of any plan theretofore adopted, and Article XII authorizes the Port Authority to "make recommendations to the legislatures of the two states or to the congress of the United States, based upon study and analysis, for the better conduct of the commerce passing in and through the port of New York."

Article XXII of the Compact defines "transportation facility" to include "railroads, steam or electric * * * and every kind of transportation facility now in use or hereafter designed for use for the transportation or carriage of per-

sons or property", and defines "railroad" as "includ[ing] railways, extensions thereof, tunnels, subways, bridges, elevated structures, tracks, poles, wires, conduits, power houses, substations, lines for the transmission of power, car barns, shops, yards, sidings, turnouts, switches, stations and approaches thereto, cars and motive equipment."

In 1922 the states, with the consent of Congress, adopted a Comprehensive Plan for the development of the Port of New York. *N. J. S. A.* 32:1–25 *et seq.; Pub. Res. No.* 66, 67th Cong., 2d Sess. The Comprehensive Plan sets forth the development program initially envisioned by the Commission for implementation by the Port Authority.

In the Plan, like the *Report* upon which it was based, unification of terminal operations and facilities, consolidation of shipments, adaptation and coordination of existing facilities, improvement of commercial rail, truck and water facilities and other freight handling improvements are set forth as principles to govern the development of the Port Authority. The Comprehensive Plan proposed to establish direct rail freight connections between New Jersey and Manhattan to furnish "the most expeditious, economical and practical transportation of freight especially meat, produce, milk and other commodities comprising the daily needs of the people." *N. J. S. A.* 32:1–29. Section 8 of the 1922 Comprehensive Plan statute denies to the Authority the power to levy taxes or assessments, and provides that the bonds or other securities issued by the Port Authority shall at all times be free from taxation by either state. *N. J. S. A.* 32:1–33. Finally, it should be noted that the power was reserved to the states to add to, modify or change any part of the Plan. *N. J. S. A.* 32:1–26.

Pursuant to the Compact, the Comprehensive Plan and subsequent amendments and supplements thereto, the Port Authority operates all of the interstate vehicular tunnels and bridges in the Port District, which include the Holland

Tunnel[8], the Lincoln Tunnel, the George Washington Bridge, the Bayonne Bridge and the Arthur Kill Bridges. In addition, the Port Authority owns and/or operates the following facilities: Newark International Airport, Teterboro Airport, LaGuardia Airport, John F. Kennedy International Airport and two heliports; Port Newark, the Hoboken Port Authority Marine Terminal, the Elizabeth Port Authority Marine Terminal, the Columbia Street Marine Terminal, the Erie Basin Port Authority Marine Terminal and a Mid-Manhattan Consolidated Passenger Ship Terminal; the Port Authority Bus Terminal, the George Washington Bridge Bus Station and the Newark and New York Union Motor Truck Terminals; the Port Authority Trans-Hudson system (operated for the Port Authority through its wholly-owned subsidiary, the Port Authority Trans-Husdon Corporation) and the World Trade Center.

Excluding the 1921 Compact and the 1922 Comprehensive Plan, the Legislatures of New Jersey and New York have adopted 39 separately enacted, concurrent statutes authorizing the construction and financing of the foregoing facilities, the issuance of bonds and notes by the Authority, the regulation of suits against it, and the establishment of a general reserve fund for the payment of the Authority's obligations. None of these 39 statutes received specific Congressional consent.

2. *The Financial Structure of the Port Authority*

Under the terms of the Compact the power to levy taxes or to pledge the credit of either state was expressly withheld from the Authority. From its inception, with the exception of monies advanced as loans by the states, the Authority was

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[8]The Holland Tunnel had been constructed by state commissions pursuant to a compact between the states which received the consent of Congress. In 1930 the Holland Tunnel was transferred to the Port Authority in order to enable it to honor its obligations to bondholders in the face of deficits incurred in connection with the Arthur Kill, George Washington and Bayonne Bridges. *L.* 1930, *c.* 247.

required to finance its facilities solely with money borrowed from the public and to be repaid out of the revenues derived from its operations. By reason of these financial limitations two concepts initially emerged which have played an important role in the realization of the purposes for which the Authority was created: first, the specific projects undertaken by the Authority should be self-supporting, *i. e.*, the revenues of each should be sufficient to cover its operating expenses and debt service requirements; and second, since the Authority is a public agency over which its creditors have no direct control, the bondholders should be protected by covenants with the Authority and with the states which have ultimate control over its operations.

The first facilities constructed by the Authority were vehicular spans linking Staten Island and New Jersey — the Arthur Kill Bridges — which were opened to traffic in 1928. A third Staten Island-New Jersey crossing, the Bayonne Bridge, was placed in operation in 1931. In that same year the George Washington Bridge was opened to traffic. With respect to each of these facilities the Port Authority was authorized to and did issue bonds in separate series to pay for the cost of acquisition of lands and construction. The revenues and tolls from each facility were statutorily pledged as security for the repayment of the series bonds issued in conjunction with the specific facility involved. *N. J. S. A.* 32:1–39, 62, 86. The States of New Jersey and New York advanced additional moneys to pay for the costs of construction, and the funds so advanced were accorded a subordinated status to the funds raised by the Authority from the sale of its own bonds to the public. *N. J. S. A.* 32:1–60, 63, 81, 87. The statutory authorizations for each project and its funding were declared to be "a contract or agreement between the two states for the benefit of those lending money to the port authority." *N. J. S. A.* 32:1–65, 89.

The first bonds issued to the public by the Authority were "closed-end" bonds based on the estimated costs of each facility, and the Authority was prohibited from issuing more

bonds than the amount initially authorized for the project. See *Goldberg, A History of the Port of New York Authority Financial Structure* (1964), at 3 (hereafter cited as *Goldberg*). The gross revenues from each bridge were applied first to the payment of expenses of operation and maintenance of the bridge, then to the payment of debt service on its bonds, and the surplus, if any, was to be deposited in a separate reserve fund available only to the bondholders of that series. *Goldberg,* at 4.

As noted earlier, the initial facilities were not self-sustaining, and in 1930 the states transferred the control, operation and the revenues of the Holland Tunnel to the Port Authority to help place the Port Authority on a self-sustaining basis. *N. J. S. A.* 32:1–119. Simultaneously, the states enacted legislation, commonly called the General Reserve Fund Act, *N. J. S. A.* 32:1–142, and by the terms of that act the surplus revenues derived by the Authority from all facilities built with the proceeds of sale of its bonds are pooled so as to create a general reserve fund in an amount equal to 10% of the par value of all bonds issued by the Authority. The act pledges the general reserve fund as security for the payment of interest and principal on all bonds theretofore or thereafter issued by the Authority. Surplus moneys of the Authority in excess of the general reserve fund requirements may be used for any purpose authorized by the states.

The general reserve fund thus becomes available to bondholders to pay the debt service requirements of facilities which were not self-supporting. By this device the surplus revenues of the Holland Tunnel were used to pay the debt service requirements of the Arthur Kill and Bayonne Bridges and the George Washington Bridge. The general reserve fund was also envisioned as a security device to induce the public to invest in future facilities such as the then contemplated Lincoln Tunnel project. See *Goldberg,* at 7.

Following the enactment of the General Reserve Fund Act the Port Authority issued additional series of bonds to finance the construction of the Inland Terminal Building and to repay

the states for the amounts expended by them to construct the Holland Tunnel. *Goldberg,* at 5. In 1935 the Authority commenced the issuance of a new series of bonds, known as general and refunding bonds, the proceeds of which were used to refund all of the original bridge bonds issued by the Authority and to finance the initial construction of the Lincoln Tunnel. These bonds were secured by a pledge of the net revenues of all of the Authority's then existing facilities and by the general reserve fund. Under the terms of the resolution authorizing the issuance of general and refunding bonds the Authority also contracted to create a special reserve fund into which would be paid all net revenues in excess of those required to pay the operating expenses of the Authority's facilities, the debt service requirements for the general and refunding bonds, and to maintain the general reserve fund at its prescribed level. *Goldberg,* at 11. The authorizing resolution imposed limitations on the use of the special reserve fund for the benefit of the bondholders.

In 1947 the Authority commenced the issuance of air terminal and marine terminal bonds, the proceeds of which were used for the acquisition and construction of various airport and marine terminal facilities. These bonds were secured by a pledge of the revenues of the specific facilities financed thereby, as well as by a call upon the general reserve fund to the extent that revenues from the facilities were insufficient to pay operating expenses and debt service requirements. As in the case of the general and refunding bonds, the air and marine terminal bond resolutions provided for their own special reserve funds for the benefit of the bondholders of each of these series.

In 1952 the Commissioners of the Port Authority embarked upon a new scheme for future financing which abandoned the practice of earmarking specific facility revenues as security for its bonds. On October 9, 1952 the Authority adopted the Consolidated Bond Resolution (the CBR), authorizing the issuance of consolidated bonds to serve as the medium for financing its activities in furtherance of any purpose for

which the Authority is authorized to issue bonds secured by a pledge of the general reserve fund.[9] Consolidated bonds constitute general obligations of the Authority, and all such bonds are equally and ratably secured by a pledge of the net revenues of all existing facilities and any additional facilities which may be financed in whole or in part by the issuance of consolidated bonds.[10]

With the adoption of the CBR the "self-supporting" facility concept which had governed earlier authority financing ceased to have the significance previously attached to it; for under the CBR the Authority's financial structure is based on a unitary enterprise concept and all revenues from all facilities are pooled. Individual facilities are not financed independently of the rest of the Authority. The facilities contribute their revenues for debt service on all Authority bonds according to their earning power and without regard to the amount of bonds issued for the construction of any particular facility.

While some facilities may not yield sufficient revenues to pay operating expenses and/or debt service requirements, what is of paramount concern to bondholders under the CBR is whether the total revenues of the Authority are sufficient to satisfy all of its obligations to bondholders. And in order to ensure that the abandonment of the "facility-by-facility" approach would not lead to a dilution of pledged revenues and reserves, the CBR contains covenants with the bondholders with respect to future operations and activities of the Authority and the issuance of bonds secured by a pledge of its revenues and reserves.

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[9]The Authority covenanted, by the CBR, that no additional general and refunding, air terminal or marine terminal bonds shall be issued.

[10]As noted *infra*, although general and refunding, air and marine terminal bonds are still outstanding, the Authority has fully funded its obligations to those bondholders and the consolidated bonds presently have a first call upon all revenues of the Authority.

One of the principal protections afforded bondholders by the CBR is the so-called "1.3 test" contained in section 3.[11] The 1.3 test prohibits the issuance of new consolidated bonds unless the best one-year net revenues of all of the Port Authority's facilities equal or are greater than 1.3 times the prospective debt service for the calendar year during which the debt service of all outstanding and proposed new bonds secured by a pledge of the general reserve fund would be at a maximum.[12] The 1.3 test is thus an equation in which one component consists of the Authority's net revenues from all facilities, and the other component is the maximum annual debt service required to be paid on all Authority bonds, including the new bonds to be issued. The maximum annual debt service component is readily calculable from the requirements set forth in the resolutions authorizing the bond issues.

[1] The annual net revenue component of the equation consists of the Authority's historical net revenues from existing facilities[13] plus the estimated average annual net revenues of the facility to be acquired or constructed with the issuance

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[11]While section 3 of the CBR provides alternate conditions for the issuance of consolidated bonds, in practice the 1.3 test described above is the least restrictive and has been the only one employed by the Port Authority since the adoption of the CBR. *Goldberg*, at 19.

[12]There is a dispute between the parties to this litigation whether a projected operating deficit of a facility to be acquired by the issuance of consolidated bonds must be deducted from net revenue for the purpose of determining whether the 1.3 test has been met. Under the terms of the CBR, if the facility to be acquired has been in operation for at least 36 months prior to the issuance of consolidated bonds, the annual operating deficit of the facility would be deducted from historical Authority net revenues in applying the 1.3 test. However, according to an Authority witness, if the facility to be acquired has not been in operation for at least 36 months, its projected operating deficit can be ignored. This view is contrary to the position of the Authority in statements made and testimony given to the Farley Committee. See *infra*, pages 152, 155–156.

[13]For this purpose the Authority is permitted to select any consecutive 12-month segment out of the 36-month period preceding the date of issuance of new consolidated bonds.

of new bonds.[14] While the 1.3 test speaks only of estimated net revenues and not of "deficits," it is evident from the purpose of the 1.3 test as well as Authority practice in arriving at historical net revenues that the estimated average annual *deficits* of a new facility must be charged against historical revenues in determining whether the 1.3 test has been met. The purpose of the 1.3 test is to protect existing bondholders against dilution of pledged revenues and reserves; if consolidated bonds are issued to acquire or construct a substantial deficit operation whose drain on Authority revenues is not included in the earning's component, the 1.3 test would be meaningless. Further, it is to be noted that in calculating historical net revenues of existing facilities the Authority arrives at one pooled figure which takes into account the deficits of such facilities.

Section 5 of the CBR directs the application of the pledged revenues to the payment of debt service upon all consolidated bonds, with the remaining balance to be paid into the consolidated bond reserve fund except to the extent necessary to be paid into the general reserve fund to maintain it at the level prescribed by statute.

Section 6 of the CBR provides that the payment of debt service upon all consolidated bonds "shall be further secured equally and ratably by the General Reserve Fund." Moneys in the general reserve fund may not be used for any purpose if there are other moneys of the Port Authority available for that purpose, unless there are sufficient funds available to the general reserve fund to pay debt service upon outstanding bonds during the ensuing 24 months, in which event such excess moneys could be used for any purpose permissible under the General Reserve Fund Act, whether or not other moneys were available for that purpose.

Section 7 of the CBR establishes a consolidated bond reserve fund into which all net revenues pledged as security

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[14]The estimated average annual net revenue is based on estimated revenues for the first 36 months of operation of the new facility.

for consolidated bonds (after payment of debt ervice on all consolidated bonds and of amounts necessary to bring the general reserve fund to its statutory level) are required to be paid. The moneys in the consolidated bond reserve fund may be used only for the payment of: (a) consolidated bonds at maturity, retirement or redemption; (b) debt service upon outstanding consolidated bonds; (c) the deficit of any facility the net revenues of which were pledged as security for consolidated bonds, and (d) "any other additional purposes for which the Authority is now or may hereafter be authorized by law to expend the revenues of its facilities." The pledge of the net revenues of the Authority and of the moneys in the Consolidted bond reserve fund is subject to the right of the Authority to apply the revenues and the reserve fund as provided in section 7, and the right to issue bonds, other than consolidated bonds, secured by the reserve fund if such other bonds "are issued solely to fulfill obligations to or for the benefit of the holders of consolidated bonds and if such other bonds are also secured by a pledge of the General Reserve Fund."

Since the adoption of the CBR, capital expenditures of the Authority have been financed by the issuance of 41 series of consolidated bonds and short term notes. New facilities and improvements to existing ones have been funded without regard to the individual poject's ability to generate income. This has enabled the Port Authority to undertake projects which would not be financially feasible alone but are possible because of the surplus revenues generated by its other facilities.[15] New projects undertaken since 1952 include the acquisition and/or construction of two heliports, the Brooklyn Erie Basin, Elizabeth and Hoboken Marine Terminals, the Port Authority Trans-Hud-

[15]For the calendar yar 1973, of the 22 facilities operated by the Authority, 14 were operated at a deficit, *i. e.*, the gross revenues were not sufficient to cver operating expenses and debt service requirements.

son (PATH) System, a bus terminal and the World Trade Center.

With respect to each series of consolidated bonds issued, the Authority adopts an authorizing resolution. Section 7 of each series resolution prohibits the issuance of any additional consolidated bonds or any other bonds to be secured by a pledge of the general reserve fund with respect to any facility or group of facilities as to which the Authority has not previously issued bonds unless

> *** * * the Authority shall certify at the time of issuance its opinion that the issuance of such Consolidated Bonds or that such pledge of the General Reserve Fund as security for such bonds other than Consolidated Bonds will not, during the ensuing ten years or during the longest term of any of such bonds proposed to be issued (whether or not Consolidated Bonds), whichever shall be longer, in the light of its estimated expenditures in connection with such additional facility or such group of additional facilities, materially impair the sound credit standing of the Authority or the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds; and the Authority may apply monies in the General Reserve Fund for purposes in connection with those of its bonds and only those of its bonds which it has theretofore secured by a pledge of the General Reserve Fund in whole or in part.**

Each consolidated bond states that it "is issued pursuant to and in full conformity with the Compact between the States of New York and New Jersey creating the Authority, and the various statutes of said two States amendatory thereof and supplemental thereto, for purposes provided in said Compact and statutes". No specific statute is mentioned in the bonds.

On December 31, 1970 the Authority placed in trust with the First National City Bank, as trustee, $60,749,000 from the Authority's special reserve fund, air terminal reserve fund and marine terminal reserve fund to secure fully, unconditionally and absolutely the Authority's obligation to provide for the redemption as scheduled and the payment of interest until redemption on the Authority's outstanding

general and refunding bonds, air terminal bonds and marine terminal bonds. After the establishment and during the maintenance of these trusts no further payments are required to be made into such reserve funds. As a result the pledge of Authority revenues and reserves to secure repayment of consolidated bonds is no longer subject to the prior lien in favor of the earlier series of bonds. The maintenance of the reserve funds in trust permits the application of all net revenues and reserves of the Authority to the payment of the consolidated bonds.

As of December 31, 1974 the issued and outstanding consolidated bonds of the Authority totaled $1,668,584,000,[16] the general reserve fund contained $173,487,000 and the consolidated bond reserve fund $46,800,000. Gross and net operating revenues for 1974 were $410,412,000 and $156,118,000, respectively. After debt service and sinking fund requirements were met the Authority had available for transfer to its reserve funds $67,018,000, resulting in a net increase in its reserves of $18,293,000 for the year.[17]

The Legislative History of the 1962 Covenant.

So far as the record reveals, the history of New Jersey's involvement with mass transit begins with the enactment of *chapter* 104 of the *Laws of* 1922. The Legislature there established the North Jersey Transit Commission[18] to study

[16]This total includes $200,000,000 of bonds issued as the 40th and 41st series following the prospective repeal legislation of 1973, which are not "affected bonds" and hence not covered by the terms of the 1962 covenant.

[17]As at December 31, 1974 the Authority owed to various banks on short term loans $255,000,000. During 1974 the banks were repaid $40,000,000, plus interest, from the consolidated bond reserve fund, which accounts for the difference between the amount available for transfer to the reserve fund and the actual increase in the reserve fund balance at the end of the year.

[18]The preamble to the North Jersey Transit Commission Act of 1922, see *infra*, notes that the Port Authority Comprehensive Plan

and report upon plans for providing a comprehensive scheme of rapid passenger transit[19] between northern New Jersey communities and New York City. In its 1925 and 1926 reports this Commission noted both the urgent need for and complexity of a rapid transit plan for the northern New Jersey area which would furnish direct access to the midtown New York City area.

In 1927 the New Jersey Legislature authorized and directed the Port Authority to make plans to provide for rapid passenger transit between the states and within the Port District. Similar legislation was adopted in New York but was vetoed by Governor Alfred E. Smith, who in his veto message noted his unwillingness to have the Port Authority diverted from its principal objective of solving the freight distribution problems within the District. Governor Smith's veto to all intents and purposes ended any legislative effort to involve the Port Authority in an active role in commuter transit for the next 30 years.[20]

The years between 1928 and 1958 were devoted to largely fruitless efforts by numerous groups, agencies and commissions to devise a solution for mass transit within the metropolitan New York-New Jersey area. No useful purpose would be served in cataloging their failures — which were not failures of purpose, effort or imagination, but the failure to find the source of funds required to implement any plan. In the meantime the financial position of existing com-

"does not include the problem of passenger traffic in the territory covered by said port development plan." *L.* 1922, *c.* 104.

[19]For the purpose of this opinion the term "rapid passenger transit" has reference to transportation of passengers by railroad and will be used interchangeably with the terms "commuter transit" and "mass transit," although the latter terms conceivably could involve means of conveyance other than by railroad.

[20]In 1936 the states requested the Port Authority to report on interstate and suburban passenger transportation. *Jt. Res. No. Laws* of 1936. The Port Authority filed its report in 1937, which disclaimed its financial ability to undertake a solution to the transit problems of the District.

muter transit facilities continued to deteriorate. By 1955 the Hudson and Manhattan Railroad had filed a petition for reorganization under the federal bankruptcy laws,[21] and the private railroads were petitioning the Interstate Commerce Commission for permission to abandon ferry service across the Hudson and to discontinue various passenger services because of substantial operating deficits.[22]

In 1958 the Metropolitan Rapid Transit Commission[23] issued a report to the states of New Jersey and New York setting forth a proposal for the construction of a trans-Hudson loop commuter transit system at an estimated capital cost of almost $500,000,000. The report noted the need to coordinate and to achieve a balance between highway and rail transportation systems. The Commission pointed out:

> That balance does not exist today. The automobile drivers and the bus operators make use of roadways, tunnels, bridges and central area terminals which are tax free and are either publicly maintained or publicly developed out of user taxes and user fees. Private railroad companies must raise the capital (and pay the interest on it) to build their rights-of-way and provide the operating facilities, and must maintain them and pay taxes on them. Since 1930, billions of public dollars have been spent, and are still being spent, by federal, state and local governments in the development of highways, bridges and other facilities for vehicular traffic, but no public funds whatever have been spent during the same period in promoting or improving

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[21] As of this date the four private companies which operate commuter railroad services in New Jersey are all being reorganized under federal bankruptcy laws.

[22] By 1959 the four commuter railroads operating in northern New Jersey sustained a total passenger operating deficit of $58,300,000. The New York commuter railroads had an aggregate deficit from commuter operations estimated at between $10,000,000 and $15,000,000 for 1960. The Staten Island Ferry operated at a loss of about $6,000,000 for the year, and the New York City Transit System had an operating deficit of $20,000,000, exclusive of debt service charges of $87,000,000.

[23] The New Jersey Metropolitan Rapid Transit Commission was created pursuant to *L.* 1952, *c.* 194 and was consolidated with its New York counterpart by *L.* 1954, *c.* 44.

> mass transportation by rail between the New York and New Jersey portions of the Metropolitan Area.
>
> The imbalance has resulted in a constant and relentless deterioration of suburban rail service. Ferries are being abandoned, train service is reduced, petitions are filed for abandonments, cars are getting older without being replaced. Repeated increases in fares in an effort to match rising costs and to establish earnings which can be used to improve the properties are resisted by public regulatory bodies. The result is more constriction of service by railroads, with consequent further congestion of highway facilities. One very grave consequence has been the creation of a stupendous cycle of traffic congestion in the streets, constantly calling for still further enormous expenditure of public funds for still further vehicular traffic.
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> Obviously, the people and the governments within this New York-New Jersey Metropolitan area are now face to face with this looming crisis, and can no longer avoid it by conveniently looking the other way.
>
> Capital for the construction of the trans-Hudson loop must be raised by a public agency and bonds issued by it must have some measure of public guarantee to be saleable. Revenue bonds for transit purposes have a bad reputation in the bond market because of the financial history and condition of transit systems. While it would be desirable that the users of the loop would pay through fares the full capital and operating cost all experience conclusively demonstrates otherwise. On the other hand, the public interest requires that the fares be established at a level to foster maximum usage and utility of the system and provisions must be made for possible deficits. In addition, it must be recognized that capital for construction and equipment cannot be secured merely by evidence that revenues will equal costs.

A study which had been prepared for the Commission on the financial structure of the proposed commuter transit system had suggested that "financing would not be available from any of the existing public authorities since this action would in some cases impair the obligations of the authorities' covenants with bondholders and would seriously affect the ability of the authorities to discharge the responsibilities for which they were established." Nevertheless, during the 1958 session of the New Jersey Legislature a bill was introduced (Assembly Bill [illegible] 16) which provided that the Port Authority take over and financially develop, improve and operate interstate passenger rail transportation between

New Jersey and New York. The Port Authority submitted a statement to the Legislature in response to this bill in which it said, among other things:

> This opposition is based on the conclusion of the Commissioners that: (1) It is legally, financially and contractually impossible for the Port Authority to assume the railroads' increasingly heavy deficits from commuter operations or the cost of developing a new and comprehensive rail rapid transit system; and (2) The assumption of rail transit deficits by the Port Authority, the self-supporting agency of the two States, would immediately cripple and very quickly destroy the program of the two States now under way for the continued development of their essential public port and harbor facilities, airports, and interstate arterial systems.
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> In addition to the General Reserve Fund, various special reserve funds have been created as a result of contractual commitments with bondholders in support of the various issues of Port Authority bonds. As in the case of the General Reserve Fund, the Authority may apply moneys in the Special Reserve Funds for purposes relating only to those of its bonds secured by a pledge of the General Reserve Fund, including purposes relating to facilities financed by such General Reserve Fund Bonds.
>
> All Port Authority revenues not applied to operation and maintenance and debt service *must* be paid into one or another of these reserve funds. There are no excess revenues which are free of this contractual commitment to bondholders.[24] [Emphasis supplied]

In its statement to the 1958 Legislature the Authority suggested that even if it were possible to ignore legal restrictions on the use of Authority net revenues to finance commuter rail deficits, such a course of action would impair the Authority's credit standing and adversely affect the ability of the Authority to carry out its then existing programs. To reinforce this view the Authority solicited and included in its statement similar expressions of opinion from members of the investment banking community.

In January 1959 a joint report was issued on Assembly Bill No. 16 by the New Jersey Assembly Committees on

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[24] In view of recent developments it should be noted that in its statement the Authority also opposed an increase in tolls for the Hudson River crossing since this would constitute an "unfair tax" upon motorists to subsidize rail transit.

Highways, Transportation and Public Utilities, and on Federal and Interstate Transportation. This report concluded that the Port Authority could not be called upon to undertake the entire rail passenger transit obligation because (1) no one could estimate the size of the deficit operation the Authority would be undertaking, and (2) while the Authority could absorb some deficit, its operations, taken as a whole, must be self-supporting.

Pressures for financial aid to and Port Authority involvement in commuter transit continued to mount, and in 1960 the New Jersey Senate created a committee (known as the Farley Committee) to study the financial structure and operations of the Authority. One of the principal subjects investigated by the Farley Committee was the Authority's role in commuter transit. At the time the Committee's hearings commenced its immediate concern was to find a means to continue the operations of the bankrupt Hudson & Manhattan Railroad (H & M). The bankruptcy reorganization proceedings involving the H & M had reached the point where, in 1959, the District Court had left the H & M with sufficient cash for operations to continue for only two years. See *In re Hudson & Manhattan Railroad Co.*, 174 *F. Supp.* 148 (S. D. N. Y. 1959), aff'd *sub nom. Spitzer v. Stichman,* 278 *F.* 2d 402 (2 Cir. 1960). The Authority's Executive Director, Austin Tobin, testified before the committee concerning his discussions with New Jersey Highway Commissioner Dwight Palmer to have the Port Authority acquire and operate the H & M. Tobin testified in September 1960:

> Faced with these legal and contractual commitments [to the Authority's bondholders], which are the whole basis of the Authority's credit, Commissioner Palmer and the Port Authority have been examining, beginning with our initial exploration of the possibility on last February 15, whether bi-state legislation could be fashioned under which the Authority might even acquire and finance the bankrupt and deficit-ridden Hudson & Manhattan properties and finance its modernization by the Port Authority as a new Port Authority facility.

In other words, could any legal and financial plan be worked out that would meet the foregoing contracts with investors and, from the standpoint of maintaining the Port Authority's credit, guarantee that the Authority would not thereupon become generally or further involved in the deficits of the commuter railroads, both in New York and in New Jersey? Obviously, unless such a covenant could be established no Port Authority bonds could be sold either for the acquisition of the Hudson & Manhattan properties or for any other Port Authority purpose.

Thus the core of the problem is whether or not the two States could, to use a phrase about it, 'build a statutory fence around' the Hudson & Manhattan by guaranteeing to investors that the Authority would not and could not become involved in the large and increasing deficits of the New York and New Jersey commuter railroads, which with the New York subways total a deficit of something like $150,000,000 a year.

In January 1961 Commissioner Palmer appeared before the Farley Committee and expressed his conclusion that the Port Authority should purchase and operate the H & M provided limitations were placed upon the Authority's role in mass transit. On this subject he testified:

The Port Authority in my opinion must make money and accumulate reserves for the rainy day if it is to be equipped to meet the needs of our two states of New York and New Jersey. It does not have general taxing powers. Its only taxes are the tolls it collects from the users of its facilities. Its shareholders are the public, you and I, and the institutions that buy the bonds. Since the cost of financing often determines the feasibility of a project it stands to reason that you and I get more for our toll dollar in the way of modern and safe facilities if we make certain that the credit rating of the Authority remains intact.

Now most of us realize that the matter of credit is not an exact science. The credit of an organization depends on quite a few factors; past performance, efficient management and calibre of personnel and markets for the product the institution has to sell; and last but not least — what investors think of the operation as a financial risk. It is, in the final analysis, the practical assessment of being repaid money that they lend to it.

Relating specifically to what ultimately became the 1962 covenant, Senator Wayne Dumont questioned Commissioner Palmer as follows:

Q. Commissioner, when the Port Authority made its proposal in September, at our hearings then, to take over the Hudson & Manhattan Tube, they surrounded their proposal with certain restrictions which, so far as I could tell were designed to eliminate any real obligation on the part of the Port Authority beyond taking over the Hudson & Manhattan Tubes, at least so far as the railroad field was concerned. Do you consider those restrictions that they surrounded this proposal with as reasonable ones? A. Yes, I do. And I have so stated in my proposal and I do it purely on the basis of what experience I may have had in the field of finance and industry, and of what we are hoping to obtain and acquire in the future in the expansion of facilities that the Port can supply.

* * * * * * * *

And it seems impossible, from all of my direct — and not through any other channels — direct contacts, to observe that money could be loaned for even the acquisition of the H&M in the event there was not some assurance that this just wasn't one bite of the cherry and that further transportation business was all to be pulled together. I think it's simply a question of whether the investor says yes or no, and at the present time my observation is the investor says no unless he has that limitation.

The following day the Port Authority's Vice-Chairman, James C. Kellogg, III, testified concerning the Authority's H & M plans. He emphasized that only by adopting what became the 1962 covenant could the Port Authority acquire and rehabilitate the H & M.

There is, of course, no possibility whatsoever that either the Port Authority or any one else could operate the H&M on a self-supporting basis. The bankrupt H&M has not paid a dividend since 1932; it has not been able to meet the interest on its bonded indebtedness and has been in receivership since 1954.

* * * * * * * *

On this estimate of the H&M losses [$5 million annually], and if we are able to satisfy prospective investors by statutory assurances that this proposal will not involve the Authority's General Reserve Fund in any other or further commuter deficit operations, we believe we can conscientiously certify, as we must under our indentures, that this financing will not impair the Port Authority's credit. On the other hand, if we are not in a position to cite such statutory assurances to those from whom we will have to borrow the money, and therefore, we are not in a position to make such a certification, we obviously would not be in a position to borrow money for the acquisition, let alone the improvement, of the H&M.

* * * * * * * *

All Port Authority revenues not applied to operation and maintenance and debt service *must* be paid into one or another of these

reserve funds. There are no excess revenues which are free from this contractual commitment to bondholders.

The most important pledges that the Port Authority has made to its bondholders are those relating to the issuance of bonds for new projects. These pledges were necessary since otherwise the security could be diluted, not only through the raiding of revenues and reserves, but just as disastrously by the unlimited issuance of bonds which have such revenues and reserves as their primary source of repayment.

It is because of this that the Port Authority had to covenant with its bondholders not to issue Consolidated Bonds supported by the General Reserve Fund for any new facility unless it can be demonstrated that, *including the new facility*, net revenues will be sufficient to cover by at least 1.3 times the maximum interest and principal payments due in any future year. Furthermore, bonds for a new faciilty cannot be issued with a pledge of the General Reserve Fund unless the Port Authority Commissioners certify that the issuance of the new bonds will not materially impair the sound credit standing of the Authority, the investment status of the Authority's bonds, or the ability of the Authority to fulfill its commitments and undertakings. Such protections for investors under open-end revenue bond issues are not uncommon.

Applied to the H&M proposal, I would like to make it clear that the question of whether or not we can borrow the $83,500,000 which is required, is not simply a question of whether or not we would have to pay a higher rate of interest on these funds. We can only submit to you the unanimous view of the Commissioners of the Port Authority that there is no possibility whatsoever of borrowing the money at all without a statutory assurance to investors that any future Port Authority responsibilities in the field of commuter rail transport over and above the present and existing interstate Hudson and Manhattan railroad system will not involve a pledge of the Port Authority's General Reserve Fund.

I say to you as a New Jersey Commissioner, and with all the sincerity that I can command, that there is nothing arbitrary or doctrinaire about this conclusion. It simply represents the Port Authority's credit. My business is investment financing and I say to you gentlemen that I could not sell a single Port Authority bond without such an assurance. If my responsibility were on the other side of the table, I would not buy a Port Authority bond that did not contain such an assurance. [Emphasis supplied]

Following Kellogg's prepared statement he was questioned by Senators Farley and Cowgill as to the binding effect

which the proposed covenant legislation could have on a subsequent legislature. The questioning proceeded as follows:

BY SENATOR FARLEY:

Q. Mr. Kellogg, I noticed in the latter part of your statement, you said you must be given assurance by the Legislature that if they directed the Port to proceed to purchase this property, they must make a pledge to the bondholders there be no further projects involving rail. Now I appreciate that if the Legislature directs you to enter into a contract involving the issuance of bonds, there will be no impairment of obligations of contract, but I must call to your attention and the members of your Commission that one Legislature cannot bind a subsequent Legislature involving policy. If, perchance, may I illustrate — ten, fifteen, twenty years from now the respective legislatures of New York and New Jersey importune your Port Authority Commission to do something in addition involving public service, one legislature cannot bind another involving policy. Do you follow me? A. I do.

Q. I appreciate the legal end of it involving obligation of contract, but in your statement that you be given assurance that no further services should be required of you involving rail forever hereafter — and how this legislature could bind a subsequent legislature I do not know. A. We'd have to say that to the bondholders, the ones that were going to purchase the new bonds, that we as Commissioners believe that this would not endanger the 1.3 ratio.

* * * * * * * *

BY SENATOR COWGILL:

Q. I want to clear one thing up. I got a little confused there for a minute on that policy business — in the event that the H&M were acquired on the basis of statutes passed by New Jersey and New York, they would not be called upon, that is, the Port Authority would not be called upon, to go into any further commuter problems of other roads. If bonds were issued under such legislation, you would not be able to issue any further bonds for anything else unless you were willing to certify that it would not — A. That's correct. It wouldn't say that the bonds couldn't be issued with a state guarantee later on for something else or something of that type, freight or anything else.

Q. It seems to me on that basis, that you enter a contract on the basis of legislation passed, that contract is going to stand and some later legislature is not going to be able to change it. A. That's right.

SENATOR FARLEY:

My question, Senator, was — and I appreciate we cannot impair obligations: In effect, would any commitment with the present legis-

lature estop or attempt to estop any legislation involving public needs in the future? [No answer was given at this point].

Commissioner Clancy of the Port Authority followed Commissioner Kellogg to the stand and the following colloquy took place directed to the same point:

SENATOR FARLEY:

I say to you as a commissioner representing New Jersey we too have a responsibility of making sure that this is done thoroughly, intelligently and in a way that would be feasible and practical. It was testified today by Mr. Kellogg that the Port should not be bound by any other demand from the State Legislature relative to rail service. I pointed out to him — and may I say to you as a lawyer — we well appreciate that any direction we give you by enacting legislation, we could not impair any obligation such as contracts of bond issues. Likewise, you as a lawyer know that one legislature cannot bind the other involving policy five, ten, or twenty years hence. A. I appreciate that.

Q. So that when this Committee makes its report, we are not exonerating the Port from any responsibility for any demand for future public service by either the New York or New Jersey legislature. I want you to appreciate that fact. A. I appreciate that fully and I am aware of the fact if a situation such as that would arise in the future, that would be a matter that we would have to discuss on its own merits with a future Governor and future legislature.

Q. That's right.

* * * * * * * *

MR. TOBIN:

May I say something?

SENATOR FARLEY:

I want to call you, Mr. Tobin, relative to this situation. If you want to interject something at this time, we will be very happy to have you do so.

MR. TOBIN:

You might want to know that this legislative assurance, as Commissioner Kellogg pointed out, would only apply to future commuter

operations and only limits the use of the pledge of the general reserve fund. It only limits the pledge of the general reserve fund, nothing else. It would not typically bar Port Authority participation where some other scheme of guarantee of the bonds or something like that —

SENATOR FARLEY:

That would have to depend on its own merit or demerit and then be considered. But I call to your attention as a Commissioner the problem of the Legislature.

I am aware of the problem, but, of course, the action that is taken now with reference to the Hudson and Manhattan would not necessarily of itself bar future participation in the problem generally. It would, however, not be possible if that future participation involved any impairment of this reserve fund.

While the Farley Committee hearings were in progress the New York Legislature adopted legislation directing the Port Authority to acquire and operate the H&M, *Laws of N. Y.* 1961, *c.* 312, without any covenant against or limitation upon future Authority involvement in passenger rail transit. This legislation was not acceptable to the New Jersey Legislature because "the absence of such a covenant * * * endangered the future utility of the Port Authority to the two States." *Report of Senate Investigation Committee Under Senate Resolution Number 7 of the Year 1961,* at 23. The Committee's report, which was issued in 1963, notes that it sponsored the 1962 covenant legislation so as to limit

* * * by a constitutionally-protected statutory covenant with Port Authority bondholders the extent to which the Port Authority revenues and reserves pledged to such bondholders can in the future be applied to the deficits of possible future Port Authority passenger railroad facilities beyond the original Hudson & Manhattan Railroad system. [*Id.* at 24]

The 1962 covenant legislation was passed unanimously by both houses of the New Jersey Legislature on February 13, 1962 and Governor Hughes signed the bill on the same day. The New York Legislature followed suit on March 7, 1962, *Laws of N. Y.* 1962, *c.* 209, and the covenant legislation be-

came effective upon Governor Rockefeller's signature on March 27, 1962.

L. 1962, *c.* 8, authorized the Port Authority to proceed with the acquisition, construction and operation of a port development project which would include the World Trade Center and the H&M. *N. J. S. A.* 32:1–35.52. For this purpose the Authority was authorized to issue bonds for the project secured by a pledge of the general reserve fund. *N. J. S. A.* 32:1–35.53. The preamble of the act reflects the following legislative findings relevant to the H&M acquisition:

> The States of New York and New Jersey hereby find and determine:
> (1) that the transportation of persons to, from and within the Port of New York and the flow of foreign and domestic cargoes to, from and through the Port of New York are vital and essential to the preservation of the economic well-being of the northern New Jersey-New York metropolitan area;
> (2) that in order to preserve the northern New Jersey-New York metropolitan area from economic deterioration, adequate facilities for the transportation of persons must be provided, preserved and maintained and that rail services are and will remain of extreme importance to such transportation of persons;
> (3) that the interurban electric railway now or heretofore operated by the Hudson & Manhattan Railroad Company is an essential railroad facility serving the northern New Jersey-New York metropolitan area, that its physical plant is in a severely deteriorated condition, and that it is in extreme financial condition;
> (4) that the immediate need for the maintenance and development of adequate railroad facilities for the transportation of persons between northern New Jersey and New York would be met by the acquisition, rehabilitation and operation of the said Hudson & Manhattan interurban electric railway by a public agency, and improvement and extensions of the rail transit lines of said railway to permit transfer of its passengers to and from other transportation facilities and in the provision of transfer facilities at the points of such transfers;
> • • • • • • • •
> (8) that the Port of New York Authority (hereinafter called the port authority), which was created by agreement of the 2 States as their joint agent for the development of the transportation and terminal facilities and other facilities of commerce of the port district and for the promotion and protection of the commerce of their port, is the proper agency to act in their behalf (either directly or by or through wholly-owned subsidiary corporations) to effectuate, as a unified project, the said interurban electric railway and its extensions and the [World Trade Center] • • • [*N. J. S. A.* 32:1–35.50]

The operative provisions of the covenant are contained in the first paragraph of § 6 of *chapter* 8, *N. J. S. A.* 32:1–35.55, and they are as follows:

> The 2 States covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, (a) the 2 States will not diminish or impair the power of the port authority (or any subsidiary corporation incorporated for any of the purposes of this act) to establish, levy and collect rentals, tolls, fares, fees or other charges in connection with any facility constituting a portion of the port development project or any other facility owned or operated by the port authority of which the revenues have been or shall be pledged in whole or in part as security for such bonds (directly or indirectly, or through the medium of the general reserve fund or otherwise), or to determine the quantity, quality, frequency or nature of the service provided in connection with each such facility; and (b) neither the States nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth.

"Affected bonds" are defined as including all bonds secured in whole or in part by the general reserve fund or any other reserve fund established by contract between the Authority and the holders of its bonds. Since all consolidated bonds are secured by a pledge of the general reserve fund, as well as the consolidated bond reserve fund, all outstanding consolidated bonds, with the exception of those of the 40th and 41st series,[25] are affected bonds under the terms of the covenant.

"Permitted purposes" as defined in the statute include: (1) the H&M as it existed on the effective date of the legislation;

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[25] See *infra* at 179–180.

(2) any railroad freight facilities owned by the Authority; (3) railroad tracks on vehicular bridges owned by the Autority; and (4) passenger railroad facilities (other than the H&M) only if one of two conditions is met: (i) the Authority certifies that such other railroad facility is self-supporting, or (ii) if the general reserve fund contains the required statutory amount (10% of all outstanding Authority bonds) and the Authority certifies that the deficit of such other facility, together with the deficits of all other passenger railroad facilities owned by the Authority, will not exceed "permitted deficits" as thereafter defined.

A passenger railroad facility may be certified as "self-supporting" if its estimated average annual net operating income for the first ten years of operations is at least equal to the estimated average annual debt service on bonds issued in connection with the facility.

A passenger railroad "deficit" is defined as the average estimated annual debt service upon the bonds issued for passenger railroad purposes over the first ten-year period of operations less the average estimated annual net operating income of the railroad facility, or plus the average estimated annual net loss of the railroad facility. To illustrate: If the average annual debt service requirement is $10,000,000 and the average annual net operating income is $5,000,000, the statutory deficit is $5,000,000. If it is estimated that an average annual net loss of $5,000,000 will be incurred from operations, the statutory deficit would be $15,000,000.

A "permitted deficit" is a deficit which does not exceed (A) the amount of the passenger railroad deficit the payment of which one or both states is willing to guarantee for the period for which the Authority would be liable for such deficit, plus (B) the greater of (1) an amount equal to 10% of the general reserve fund at the end of the preceding calendar year less an amount equal to 1% of the Authority's bonds outstanding at the end of the preceding calendar year which were issued for passenger rail purposes (including the H&M), or (2) an amount equal to 10% of the amount

calculated under clause (1) plus 1% of the Authority's equity in all facilities other than passenger rail facilities.

Thus, assuming the States of New York and New Jersey enter into an agreement with the Authority to pay the deficit of a proposed passenger railroad facility, the deficit of such facility is a permitted deficit under the 1962 covenant and the Authority is authorized to issue its bonds for such purpose. In the absence of a guarantee by the states to pay any part of the deficit, the maximum permitted deficit must be calculated under (B) as reflected in the following illustration: Assuming the general reserve fund contains $175,000,000 and the Authority has outstanding bonds issued for the H&M and other passenger railroad purposes in the amount of $150,000,000, clause (1) permits the Authority to issue bonds secured by the general reserve fund if the estimated average annual deficits of all its passenger rail facilities, including the proposed facility, do not exceed $16,000,000 ($17,500,000 – $1,500,000). Assuming the same facts and an Authority equity in nonrailroad facilities of $1,200,000,000, under clause (2) the permitted deficit would be $13,600,000 ($1,600,000 + $12,000,000). Hence, on the assumed facts, since the amount calculated under clause (1) is greater, the permitted deficit would be $16,000,000[26].

On September 1, 1962, following enactment of the 1962 covenant legislation referred to above, the Port Authority, through a wholly-owned subsidiary (Port Authority Trans-Hudson Corporation or PATH), assumed ownership and operating responsibilities over the H&M. The Commissioners' 1962 certification with respect to the acquisition of the PATH System was made on the basis of an opinion of A. Gerdes Kuhbach, the Director of Finance of the Port Authority,

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[26]Since the annual deficits of the H&M (operated by the Authority under the acronym PATH) are substantially in excess of the permitted deficits calculated under 1963 covenant formula, the covenant prohibits the Authority from issuing any bonds for passenger rail purposes which would be secured by a pledge of the reserve funds of the Authority. See *infra* at 165.

which was prepared at the request of the Commissioners. His opinion analyzed and reviewed the financial aspects and data relating to the proposed acquisition, rehabilitation and operation of the PATH system. He concluded that the section 7 certification required under the series consolidated bond resolutions could be made, since the anticipated net loss after debt service for the years 1969 through 1991 would level off at approximately $6,595,000[27] per year, an amount that would not impair the sound credit rating of the Port Authority. More specifically, Kubach concluded that

> a) There is always a comfortable margin between the anticipated net loss and 10% of the estimated General Reserve Fund;
>
> b) Net revenues available for Reserves will not be materially diluted by undertaking the acquisition, rehabilitation and operation of the Hudson Tubes:
>
> c) The coverage of both annual obligatory long term debt service and future maximum debt service is sufficiently within the limits necessary to preserve the Port Authority's credit and to continue the issuance of Consolidated Bonds.
>
> I therefore conclude that the application of all or any portion of unexpended proceeds of Consolidated Bonds, Nineteenth Series, Due 1991, will not during the years 1962 through 1991, in light of the estimated expenditures in connection with the Hudson Tubes, materially impair the sound credit standing of the Authority or the investment status of the Consolidated Bonds or the ability of the Port Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds.

Since the enactment of the 1962 covenant the Port Authority has referred to the covenant in all official statements furnished to the public in connection with each series of consolidated bonds issued by the Authority. The reference is set forth under the heading "Statutory Covenant With Prior Affected Bondholders Against Dilution of Pledged Revenues and Reserves by Additional Passenger Railroad Deficits," and the terms of the covenant are then summarized. The first two sentences of text read as follows:

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[27] In 1962 the general reserve fund was approximately $69 million.

> In connection with the legislation which authorized the Port Authority to assume responsibility for the Hudson Tubes system the Port Authority had advised the Legislatures of both States that the credit of the Port Authority would be impaired by such an undertaking of an anticipated perpetual deficit facility unless the States would enter into an enforceable contract with the Port Authority bondholders which would grant assurances against dilution of already pledged revenues and reserves by any additional passenger rail deficits beyond those of the basic Hudson Tubes System. The legislation as finally adopted includes such statutory covenants.

As of December 31, 1973 the Authority had invested $185,800,000 of its funds in the acquisition and improvement of PATH. The accumulated operating deficits of PATH (determined in accordance with ICC accounting practices) total $125,000,000,[28] of which approximately $17,000,000 constitutes depreciation. PATH has incurred an annual deficit after debt service for each of the last five years in excess of 10% of the general reserve fund. Accordingly, under the 1962 covenant the Port Authority would be precluded from pledging any of its revenues or reserves to any other deficit passenger railroad operation. In 1973, using the Authority's accounting procedures, the PATH deficit for the year, including debt service, was $24,913,000.

Following the enactment of the 1962 covenant legislation an action was instituted in the New York state courts challenging the validity of the statute by New York property owners. The principal issues presented in the action dealt with the legislative authorization to the Authority to construct the World Trade Center. The plaintiffs urged, among other things, that the legislation was unconstitutional because no congressional consent had been obtained. The New York Court of Appeals upheld the constitutionality of the covenant legislation, and the appeal therefrom was dismissed by the United States Supreme Court for want of a substantial fed-

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[28] Using the Authority's method of accounting, the accumulated PATH deficit as of December 31, 1973 was $153,073,000, inclusive of debt service.

eral question. *Courtesy Sandwich Shop v. Port of N. Y. Auth.*, 12 *N. Y.* 2d 379, 240 *N. Y. S.* 2d 1, 190 N. E. 2d 402, app. dism. 375 *U. S.* 78, 84 S. Ct. 194, 11 L. Ed. 2d 141, *reh. den.* 375 *U. S.* 960, 84 S. Ct. 440, 11 L. Ed. 2d 318 (1963). The Court of Appeals disposed of the consent argument in the following manner:

> **This argument must fail because, assuming consent to be required for this sort of concurrent action, the congressional consent originally given in 1921 and 1922 to the bi-State compact creating the Port Authority expressly contemplated such further co-operative legislation in furtherance of port purposes as was here accomplished. * * * Among the Articles of Agreement consented to were articles III, VII and VI, which created the Port Authority with the powers enumerated plus "such other and additional powers as shall be conferred upon it by the legislature of either State concurred in by the legislature of the other." Similarly, article XI, following the agreement for an initial comprehensive plan in article X, provides that the Port Authority should "from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two States, they shall be binding upon both States with the same force and effect as if incorporated in this agreement." Chapter 209 clearly falls within the congressional consent given to the articles contemplating the grant to the Port Authority of additional powers within the framework of the compact. [12 *N. Y.* 2d at 391, 240 *N. Y. S.* 2d at 7, 190 N. E. 2d at 406]**

The lack of congressional consent to the covenant legislation was also raised by Port Authority bondholders in *Port Authority Bondholders Pro. Com. v. Port of N. Y. Auth.*, 387 *F.* 2d 259 (2 Cir. 1967). The Court of Appeals affirmed the dismissal of the bondholders complaint, having concluded that the United States Supreme Court's disposition in *Courtesy Sandwich Shop* had labeled the question "as unsubstantial." 387 *F.* 2d at 262.

In 1971 Theodore Kheel, Esq., and others instituted a class action in the United States District Court for the Southern District of New York challenging the constitutionality of the 1962 covenant on the grounds that it restricted the Authority's power to devote its revenues to nonself-supporting passenger rail facilities, in violation of the Compact and

Commerce Clauses of the United States Constitution, and impaired legislative sovereignty. The District Court dismissed the complaint, relying in part upon the disposition made in *Courtesy Sandwich Shop. Kheel v. Port of N. Y. Auth.*, 331 *F. Supp.* 118 (S. D. N. Y. 1971), aff'd on other grounds, 457 *F.* 2d 46 (2 Cir. 1972), *cert. den.* 409 *U. S.* 983, 93 S. Ct. 324, 34 L. Ed. 2d 248 (1973).

Legislative History of the Repeal of the 1962 Covenant.

Despite the enactment of the 1962 covenant, during the latter part of the 1960's and continuing to date there has been increasing public and governmental demand for the Port Authority to make a greater contribution toward a solution of the mass transit problems within the Port District. The critics of the Port Authority, as well as responsible executive and legislative officials, have focused primarily upon the utilization of the surplus earning capacity of the Authority's existing facilities to finance further Authority acquisition of or direct subsidies to mass transit facilities. It may be noted that between 1961 and 1970 the net revenues of the Authority had increased from $68,000,000 to $115,000,000, and over that period the Authority had available to it $454,000,000 in funds in excess of its debt service requirements.

In July 1964 Congress enacted the Urban Mass Transportation Act of 1964 (49 *U. S. C. A.* §§ 1601 *et seq.*), expressing for the first time a federal legislative interest in the support of urban mass transportation systems. In enacting the 1964 act Congress found (49 *U. S. C. A.* § 1601(a)):

> **(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;**
>
> **(2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate**

provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) the Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

The purposes of the 1964 act were declared to be (49 *U. S. C. A.* § 1601(b)):

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economic and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

The scope of the 1964 act was expanded by the Urban Mass Transportation Assistance Act of 1970 on the basis of a finding by Congress (49 *U. S. C. A.* § 1601a) that "the rapid urbanization and the continued dispersal of population and activities within urban areas has made the ability of all citizens to move quickly and at reasonable cost an urgent national problem."[29]

In April 1970 Governors Cahill and Rockefeller announced a joint program to increase the Port Authority's role in mass transportation by building a rail link to John F. Kennedy International Airport and extending PATH to Newark International Airport and other parts of New Jer-

[29]In November 1974, after the repeal of the 1962 covenant, Congress enacted the National Mass Transportation Assistance Act of 1974, which provided $11.8 billion over the next six years for mass transit capital expenditures and, for the first time, operating subsidies on a matching basis.

sey. Bills were introduced in the New Jersey and New York Legislatures authorizing the Port Authority to undertake mass transportation projects providing access to John F. Kennedy and Newark International Airports. In March 1971 joint hearings were held in New York and New Jersey by the New York State Assembly Committee on Corporations, Authorities and Commissions and by the Autonomous Authorities Study Commission of the New Jersey State Legislature with respect to the relationship of the Port Authority to mass transportation and the proposed passenger rail links to the airports. In June 1971 the Legislatures of New York and New Jersey enacted legislation authorizing the Port Authority to extend passenger rail transportation to Kennedy International Airport and to Newark International Airport and Cranford. *L.* 1971, *c.* 245; *N. J. S. A.* 32:1–35.20 *et seq.* The sponsors of this legislation sought to avoid the limitations of the 1962 covenant by characterizing the proposed new railroad facilities "as constituting a part of each air terminal" rather than independent passenger railroads. *L.* 1971, *c.* 245, § 1. While this legislation was pending, the Port Authority obtained opinion letters from two New York law firms which concluded that the proposed rail extensions were subject to the provisions of the 1962 covenant and could not be financed out of Port Authority revenues or reserves unless "self-supporting" since PATH had used up all of the "permitted deficits" allowed by the covenant.

Following the enactment of the 1971 legislation the Commissioner of the New Jersey Department of Transportation commissioned a consulting firm to report on the Authority's ability to finance and operate the New Jersey PATH extension under the terms of existing covenants with bondholders, and to propose alternative financing programs if the Authority could not. The consultant's report was submitted in December 1971. At the outset it was noted that on the assumption the proposed additional facilities would operate

at a deficit, the 1962 covenant prohibited Authority financing and operation since the PATH deficit already exceeded the "permitted deficits" allowed by the covenant. The conclusion of the report was that the Port Authority was not, under the 1962 covenant, in a "favorable position" to provide the additional financing necessary for the proposed extensions of existing passenger rail facilities. The consultants recommended as an alternative solution the removal of PATH from the Authority's control so that the latter would no longer be responsible for its deficits.

In June 1972 the Port Authority and New Jersey Department of Transportation concluded on the basis of an engineering cost study that the proposed extension of PATH via Newark Airport to Cranford was not economically feasible under the terms of the 1962 covenant.

In the same month the State of New York passed a bill repealing the 1962 covenant. *Laws of* N. Y. 1972, *c.* 1003. Governor Rockefeller's message on the signing of that legislation stated:

> I am approving this bill in order to give incentive to the Port of New York Authority to proceed with urgently needed mass transportation facilities in the metropolitan region.
>
> Passed with overwhelming bipartisan support in both houses of the Legislature, the bill removes the absolute statutory prohibition against the use of the revenues of the Port of New York Authority for railroad purposes. That statutory covenant, together with the provision of the bi-state compact creating the Authority that neither State will construct competing facilities within the Port District, could forever preclude the two states from undertaking vitally needed mass transportation projects. In removing the present restriction, the bill would not jeopardize the security of Port Authority bondholders or their rights to maintain that security.
>
> * * * * * * * *
>
> New York, by the enactment of this measure, is taking an essential step in its long-range effort to realize the full potential of the Port Authority in meeting the total transportation needs of the New York-New Jersey port district. The Port Authority's active participation in helping to solve the problems of mass transportation in the New York City metropolitan area will inure to the benefit not only of millions of area residents generally, but also to the port facilities operated by the Authority and the workers and businesses that rely on them. This bill is consistent with the original purpose of the Port Authority — to ensure the coordinated development of terminal, transportation and other facilities of commerce in and about the port district for the greater benefit of the people of New York and New Jersey.

The repeal of the 1962 covenant adopted by New York proved to be unacceptable at that time to the New Jersey Legislature and Governor Cahill, and on November 15, 1972, following a series of meetings among Governors Cahill and Rockefeller and the Commissioners of the Port Authority, the Governors announced agreement on a bi-state plan of passenger rail transportation development by the Port Authority. The plan provided for the extension of PATH via Newark Airport to Plainfield, direct rail service from Kennedy Airport to New York City, and direct rail service to Penn Station, New York, for riders of the Erie Lackawanna Railroad in six northern New Jersey counties and two counties in New York. The estimated total cost of the plan was $650,000,000 and it was estimated that the Port Authority would invest between $250,000,000 and $300,000,000, with the balance of the funds being furnished by grants from the Federal Urban Mass Transportation Administration and the states. The Governors also proposed to repeal the 1962 covenant with respect to bonds issued subsequent to the enactment of the legislation proposed by the Governors.

On December 11, 1972 the New Jersey Senate held an information session to consider pending Port Authority mass transit bills. During this session representatives of the Port Authority and of Governor Cahill's office stated that the State of New Jersey would have to commit substantially all of the funds then available to the State of New Jersey from the Federal Urban Mass Transportation Administration.

The legislation embodying the 1962 covenant was amended by the State of New Jersey on December 28, 1972, *L.* 1972, *c.* 208, so as to repeal the 1962 covenant with respect to

Authority bonds issued after the effective date of the legislation. The New York Legislature enacted concurrent legislation which became effective on May 10, 1973. *Laws of N. Y.* 1973, *c.* 318.

On April 22, 1974 the New Jersey Legislature enacted *chapter* 25 of the *Laws of* 1974 (the "repeal act"). Governor Byrne signed the bill on April 30, 1974. Section 1 of this act repealed section 3 of *chapter* 208 of the *Laws of* 1972, the effect of which is to repeal, retroactively, the 1962 covenant as to all issued and outstanding "affected bonds" issued by the Port Authority. The introducer's statement annexed to the Assembly Bill No. 1304 (which became *chapter* 25), sums up the intent and purpose of the action taken:

This bill is designed to preclude the application of the 1962 covenant restricting port authority participation in mass transit projects. Chapter 208, P. L. 1972, precluded such application to bonds newly issued after the effective date of that act, but maintained in status quo the position of holders of bonds issued between March 27, 1962 and December 28, 1972. Since affected bonds are outstanding until the year 2007, the restrictions imposed by the covenant effectively preclude sufficient port authority participation in the development of a public transportation system in the port district. In 1972 the State of New York passed legislation precluding the application of the 1962 covenant from outstanding bonds as well as newly issued bonds. It is the purpose of this act to accomplish effective repeal of the covenant.

Concurring legislation was signed into law by Governor Wilson of New York on June 15, 1974. *Laws of N. Y., c.* 993. Governor Wilson issued a statement when he signed the bill, in which he said in part:

In response to my inquiry, the Chairman of the Port Authority has also advised me that because of the heavy long term capital commitments for the PATH facilities and the Kennedy rail link, the Authority has no significant capacity to contribute funds for operating subsidies for commuter railroads. Hence, the plain and simple fact of the matter appears to be that the Authority has virtually no excess funds that could be channeled into operating subsidies for mass transportation facilities in the New York metropolitan area.

Even if such funds were available, existing bond indenture provisions which survive despite repeal of the statutory covenant would prohibit their use except in relation to facilities owned, leased or operated by the Port Authority.

The legislative history of the repeal of the covenant would not be complete without reference to other developments which were of immediate and continuing concern to the states and the nation at or about the time the repeal legislation was enacted. Commencing in the early 1950's and continuing to date the two states initiated studies of air pollution problems in their jurisdictions, and legislative action to control air pollution was undertaken by New Jersey as early as 1954, see *N. J. S. A.* 26:2C–1 *et seq.*, and by New York in 1957, see *Laws of N. Y., c.* 931. In 1955 the United States Congress enacted the Clean Air Act, 42 *U. S. C. A.* § 1857 *et seq.*, the preamble of which sets forth the following findings (among others):

(a) The Congress finds —

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration and property, and hazards to air and ground transportation.

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments • • •

The studies which were undertaken identified automobile exhaust emissions as a significant contributing factor in air pollution, and as the primary source of air pollution in the City of New York. In 1962 the State of New York adopted legislation requiring the installation of positive crankcase devices on new cars. *Laws of N. Y.* 1962, *c.* 994. While similar legislation was not enacted in New Jersey, the State did institute on February 1, 1974 an auto emission

testing program as part of the mandatory motor vehicle inspection system.

The efforts of the states to alleviate health hazards associated with air pollution were given a major impetus by the congressional enactment in 1970 of amendments to the federal Clean Air Act, 42 *U. S. C. A.* § 1857(*c–l*) *et seq.*, pursuant to which the Administrator of the federal Environmental Protection Agency was authorized to establish national air quality standards and to prescribe, upon the failure of a state to do so, the steps necessary to achieve compliance with those standards.

On November 13, 1973, after the State of New Jersey failed to present an acceptable plan for achieving compliance with the national air quality standards for hydrocarbons and carbon monoxide, the federal Administrator promulgated regulations designed to achieve a major reduction in hydrocarbon and carbon monoxide pollution in the northern part of New Jersey. 38 *Fed. Reg.* 31388 *et seq.* The federally-mandated plan for New Jersey included the mandatory use of retrofit devices on gasoline-powered vehicles and "the application of certain transportation control measures including a requirement for a significant reduction in vehicle miles traveled." 38 *Fed. Reg.* 31389. The Administrator also emphasized the importance of the development of mass transit to the effort to improve New Jersey's air quality:

> **The development of large-scale mass transit facilities and the expansion and modification of existing mass transit facilities is essential to any effort to reduce automotive pollution through reductions in vehicle use. The planning, acquisition, and operation of a mass transit system is, and should remain, a regional or State responsibility. Many improvements are being planned in mass transit facilities in the State that will make it possible for more people to use mass transit instead of automobiles. • • • [38 *Fed. Reg.* 31389]**

Finally, reference must be made to the energy crisis, the dimensions of which became a matter of national concern in the fall of 1973 with the imposition of an oil embargo by

Arabian suppliers of crude oil and the rapid escalation of the price of oil. On February 4, 1974, two months before the repeal legislation was enacted, the New Jersey Legislature passed the Emergency Energy Fair Practices Act of 1974 (*L.* 1974, *cc.* 2, 6).

Section 2 of that act stated:

> **The Legislature finds and determines that because of world conditions and the manner in which energy sources and fuels are allocated and distributed that an energy shortage now exists and may continue for the foreseeable future.**

Section 3 of the act authorized the Governor "to proclaim by Executive Order the existence of an energy emergency" and to establish a State Energy Office and appoint an Administrator with broad powers to control the use and distribution of all fuels. On February 5, 1974 Governor Byrne issued Executive Order No. 1 in which he proclaimed the existence of an energy emergency, created the State Energy Office and established the position of Administrator of that office.

In December 1973 the Regional Plan Association issued a report on the relationship of the energy crisis to transportation. Its findings noted the decline of public mass transit in the metropolitan region and the increased consumption of fuel caused by reliance upon private automobiles to satisfy the major passenger transportation demand of the region. The Association pointed out that

> **If we are serious about meeting a profligate demand for energy over the long pull, we will have to begin now to design a Region that is less energy consumptive in transportation and in its development pattern.**

While the immediate effects of the oil embargo have been dissipated, the nation is still confronted with the long-range effects of oil price increases, particularly as they bear upon the economic well-being of the country. On February

21, 1974 President Nixon described the problem in these terms in a special message to Congress on the energy crisis:

> We must also face the fact that when and if the oil embargo ends, the United States will be faced with a different but no less difficult problem. Foreign oil prices have risen dramatically in recent months. If we were to increase our purchase of foreign oil, there would be a chronic balance of payments outflow which, over time, would create a severe problem in international monetary relations. [*U. S. C. Cong. and Admin. News*, 93rd Cong., 2d Sess. at 36.]

The President further observed, "it is widely recognized now that the development of better mass transit systems may be one of the key solutions to both our energy and environmental problems." *Id.* at 42. Congress has repeatedly made similar findings. For example, the Regional Rail Reorganization Act of 1973, enacted on January 2, 1974, contains specific findings by Congress that "rail service and rail transportation offer economic and environmental advantages with respect to * * * energy efficiency and conservation * * * to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest," and that "railroads are one of the most energy-efficient modes of transportation for the movement of passengers and freight." 45 *U. S. C. A.* §§ 701, 761.

Bondholder Reliance on the 1962 Covenant and the Effects of Repeal.

Commencing with the issuance of the 20th series of 1962 the Authority advised potential investors of the existence of and protection afforded by the 1962 covenant by including detailed reference to the covenant in the official statements distributed to the public. U. S. Trust alleges in its complaint that purchasers of the Authority's consolidated bonds relied on the notice thus given to them in making their purchases. It is also alleged that the repeal of the covenant has diminished and will continue to adversely

affect the value of the bonds in the secondary market.[30] These issues were the subject of a trial at which U. S. Trust produced four witnesses in its behalf, together with numerous exhibits. Defendants relied upon cross-examination of plaintiff's witnesses plus their own exhibits.

Port Authority consolidated bonds are known in the market place as revenue bonds, *i. e.*, they are payable solely from the revenues and reserve funds derived from the facilities operated by the Authority. In the main these bonds are sold to relatively sophisticated institutional investors either for their own accounts or for the accounts of others whose investment funds they manage. Since the bonds carry a fixed rate of return and must compete against other similar types of securities available in the market place, the interest rate fixed when the bonds are initially marketed, as well as the price of the bonds in the secondary market, will normally reflect the investor's evaluation of the underlying security of his investment and the prevailing interest rates available on similar types of securities.

Prior to 1962 the Authority had successfully marketed several hundreds of millions of dollars of its consolidated bonds without the existence of the covenant. Presumably those issues were marketed on the strength of the Authority's overall revenues and reserves as well as in reliance on the previously enacted statutory covenants and the covenants contained in the CBR. The interest rates on these bond issues varied from a low of 2¾% (the 2nd and 4th series) to a high of 4¼% (16th series). The interest rate on the last bond issue offered prior to the enactment of the covenant was 3½% (19th series).

In the early 1960's, prior to the enactment of the 1962 covenant, the likelihood of legislation directing the Authority to take over the H & M became apparent. The record strongly suggests that the Authority itself took the

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[30]The secondary market in this context refers to the over-the-counter price at which the bonds are traded after the initial offering.

initiative in arousing the concern of the investment banking community to the implications of such legislation for the future financial well-being of the Authority. Whether this action was attributable to the Authority's fear of the "disease" of mass transit, see *Goldberg,* at 22, or a legitimate concern as to the Authority's ability to absorb substantial mass transit deficits is not the point; the fact of the matter is that the Legislature of 1962 concluded it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority.

The fact of the covenant's existence and its terms were communicated to the public and were a matter of general knowledge among investment bankers, institutional investors and dealers in Authority bonds. It may fairly be said, however, that few, if any, members of the investment community ever analysed closely the actual effect of the 1962 covenant upon bondholder security. The principal witness offered by U. S. Trust in support of its contentions, John F. Thompson, whose credentials and qualifications are impeccable, when asked to compare the protections afforded bondholders by the 1962 covenant with the restrictions imposed by the CBR (*i. e.,* the 1.3 test and the section 7 certification required by the bond series' resolutions), testified:

> Well the 1962 covenant and its requirements, require more specific determinations by the commissioners, by the staff and the commissioners as to the earnings or prospects of deficits involved, and they are — well, in the case of the Section 7 requirements, the commissioners can simply rule or state their opinion that the requirement would not harm the holders of the outstanding debt. In the case of the 1.3 times, they are permitted estimates of future earnings to some degree as well as the historical earnings. This is a test which might be complied with on the initiation of a deficit rail facility, and later be found to have not avoided deficits by any means as given the propensity of these deficits to greatly increase.
>
> The determinations which must be made under the covenant, I believe, are much more susceptible to active testing, by those looking at the Port Authority from the outside, and those in the investment community a much more secure feeling about the future profitability of the Port Authority.

Based upon the testimony offered by plaintiff, the investment community's understanding of the covenant was that it in some manner furnished "security for the bondholders and it protected the diversion of the earnings of the Port Authority into deficit mass rail transit." If the covenant is to be understood in that sense, the record supports plaintiff's claim that investors relied on the covenant in purchasing Authority bonds. But while reliance existed, the covenant cannot be said to have been the "primary consideration" for the purchases having been made, for no witness testified that purchases would *not* have been made without the covenant, but only that they would not have purchased or recommended the purchase of the bonds "at the price which they were then offered."

The limited role of the covenant on the Authority's credit standing is also reflected in the ratings assigned to Port Authority bonds by the principal rating services, Moody's and Standard and Poor's. Both have rated Authority bonds as "A" bonds, meaning that they are of investment quality and no default in payment of principal or interest is anticipated. The bonds carried the same rating prior to the enactment of the covenant, after it was enacted, after it was prospectively repealed, and after the repeal act of 1974. As suggested in the reports of the rating services, the rating assigned to Port Authority bonds is an amalgam of many factors, including not only the covenant but "the Authority's strong operating, financial and management record".[31]

Following the 1962 covenant legislation the Port Authority issued 20 series of bonds prior to the enactment of the prospective repeal which became effective on May 10, 1973. The interest rates on these bonds ranged from a low of 3-1/4% (20th series) to a high of 6-5/8% (35th series). After the prospective repeal was enacted, the Authority marketed

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[31] As expressed by one of the witnesses, the Authority "has been well-run, well-organized, well-managed * * *. It's continually shown good revenues."

two additional bond issues, the 40th and 41st series, which carried interest rates of 6% and 5-1/2%, respectively. While it is claimed by plaintiff that the last two series of bonds are indirectly protected by the covenant until the "affected" bonds are retired in the year 2007, it is clear that the interest rates which the Authority has had to pay on non-affected bonds were not materially affected by the absence of direct covenant protection.

Plaintiff also attempted to show through its witnesses and exhibits that the repeal of the covenant adversely affected the secondary market for Authority bonds.[32] This conclusion was expressed by several witnesses who voiced the opinion that not only was the secondary market price of the bonds adversely affected, but that the nature of the market was altered in the sense that the market for the bonds became thin[33] and large institutional investors refused to purchase the bonds after repeal. There can be no question but that immediately following repeal and for a number of months thereafter the market price for Port Authority bonds was adversely affected. This was conclusively demonstrated by plaintiff's exhibits comparing the market price of selected Port Authority bonds, before and after repeal, with the prices of comparable bonds over the same period.

The problem presented by plaintiff's proofs, however, is that they do not show that the adverse effect attributable to the covenant repeal was permanent. Thus, immediately prior to repeal the price of Massachusetts Port Authority bonds was approximately two points higher than that quoted for New York - New Jersey Port Authority bonds having the same interest rate and a similar maturity.[34] The spread in

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[32]The repeal became effective when the concurrent New York legislation was signed by Governor Malcolm Wilson on June 15, 1974.

[33]A "thin" market is one characterized by a low volume of trading in which the price structure of the market is subject to sharp fluctuation by relatively small buy or sell orders.

[34]The bonds prices referred to in the text are derived from Exhibits P-90 and S-3 and the trial transcript.

favor of "Mass Ports" fluctuated immediately after repeal but showed a market tendency to increase until it reached a maximum of 6-1/2 points on August 2. The spread continued to fluctuate thereafter and reached a maximum of 12 points by December 13, 1974. By January 3, 1975 the spread had narrowed to three points, and never exceeded four points through January 23, 1975. By the date of the trial the spread was reduced to two points, which is the same differential that existed prior to the effective date of the repeal.

Furthermore, beginning in August 1974 there were other factors which unquestionably contributed to the adverse price differential prevailing between Port Authority bonds and those of comparable issues. On August 15, 1974 the *Wall Street Journal* carried a story detailing the Authority's problems in completing and renting space in the World Trade Center. Then, on November 10, 1974, the *New York Times* ran a multi-column feature story with the headline "Port Authority Has Fallen on Hard Times." This story, like the one carried by the *Wall Street Journal* in August, referred to the Authority's difficulties at the World Trade Center and its losses on that project, estimated in the article to be as high as $25,000,000 a year.[35] The article also suggested that other Authority facilities which formerly had been profitable were breaking even or losing money. It is to be noted that Port Authority bonds suffered their sharpest decline for the whole period under review during the one month period following the *New York Times* article. On November 8, 1974 the bonds were quoted at 78, and by December 13, 1974 the price had dropped to 65.

The bottom line of plaintiff's proofs on this issue is simply that the evidence fails to demonstrate that the secondary market price of Authority bonds was adversely affected by the

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[35]The latest available figures disclose that the World Trade Center incurred a deficit for the year 1973 of $16,460,000.

repeal of the covenant, except for a short-term fall-off in price, the effect of which has now been dissipated insofar as it can be related to the enactment of the repeal

The Validity of the Repeal of the Covenant.

[2] Plaintiff's position here is premised on the proposition that the 1962 covenant legislation created a contract between the States of New Jersey and New York and the bondholders of the Port Authority which prohibited the use of Port Authority revenues and reserve funds for passenger railroad purposes except as expressly permitted by the terms of the act. The repeal act of 1974, it is said, impairs the obligation of that contract in violation of *U. S. Const.*, Art. I, § 10 of the United States ("No State shall * * * pass any * * * Law impairing the Obligation of Contract * * *") and *N. J. Const.* (1947), Art. IV, § VII, par. 3. ("The Legislature shall not pass any * * * law impairing the obligation of contracts * * *").[36]

[3] At the outset it is essential to define the terms of the contract and the nature of the impairment claimed by plaintiff. When the 1962 covenant was enacted there was in existence the CBR of 1952, pursuant to which the Authority had pledged its net revenues and the reserve funds as security

[36]Plaintiff also urges that the repeal act contravenes the Fifth and Fourteenth Amendments of the United States Constitution and Article I, par. 20 of the New Jersey Constitution. The contention is that the repeal constituted a "taking" of property without due process of law, *i. e.*, just compensation. This issue will not be considered in this opinion for the following reasons: (1) to the extent that the claim is based upon an alleged reduction in the secondary market price of Authority bonds, it has been factually rejected *supra*, and (2) the test of constitutional validity as applied to repeal legislation is the same under the Contract and Due Process Clauses, *i. e.*, if an unlawful impairment has occurred there has been a "taking," and if not, then there is no taking. See *Veix v. Sixth Ward B. & L. Ass'n*, 310 *U. S.* 32, 41, 60 S. Ct. 792, 84 L. Ed. 1061 (1940); *Lynch v. United States*, 292 *U. S.* 571, 578–581, 54 S. Ct. 840, 78 L. Ed. 1434 (1934); Hale, "The Supreme Court and the Contract Clause: III," 57 *Harv. L. Rev.* 852, 890 (1944).

for the payment of debt service on all consolidated bonds. The CBR and the series' resolutions, pursuant to which all outstanding consolidated bonds were issued, constitute a contract between the bondholders and the Authority, and that contract was unaffected by the enactment of the 1962 covenant. The covenant superimposed upon the security provisions of the CBR and the series' resolutions the further agreement of the states that neither the Authority's revenues nor its reserve funds would be used for any additional passenger railroad facility whose estimated deficit would exceed 10% of the amount in the general reserve fund.[37] To the extent that the repeal of the covenant authorizes the Authority to assume greater deficits for such purposes, it permits a diminution of the pledged revenues and reserves and may be said to constitute an impairment of the states' contract with the bondholders.[38] *Bronson v. Kinzie*, 42 *U. S.* (1 *How.*) 311, 11 L. Ed. 143 (1843); *Planters' Bank of Miss. v. Sharp*, 47 *U. S.* (6 *How.*) 301, 327, 12 L. Ed. 447 (1848); *Hawthorne v. Calef*, 69 *U. S.* (2 *Wall.*) 10, 17 L. Ed. 776 (1864); *Von Hoffman v. City of Quincy*, 71 *U. S.* (4 *Wall.*) 535, 18 L. Ed. 403 (1867); *W. B. Worthen Co. v. Kavanaugh*, 295 *U. S.* 56, 55 S. Ct. 555, 79 L. Ed. 1298 (1935); *New Jersey Highway Authority v. Sills*, 109 *N. J. Super.* 424 (Ch. Div. 1970), supplemented 111 *N. J. Super.* 313 (Ch. Div.

[37]The statutory formula for permitted deficits is set forth in more precise detail, *supra* at 162–163.

[38]It is not disputed by defendants that a legislative enactment, such as the 1962 covenant, may constitute a contract. Such has been the law since *Fletcher v. Peck*, 10 *U. S.* (6 Cranch.) 87, 3 L. Ed. 162 (1810). See also, *New Jersey v. Yard*, 95 *U. S.* 104, 114, 24 L. Ed. 352 (1877), where the court said: "It has become the established law of this Court that a legislative enactment * * * may contain provisions which * * * become contracts * * * within the protection of the [Contract Clause]." The legislative history associated with the enactment of the 1962 covenant as well as the statutory language used establish fairly conclusively that the Legislature intended the covenant to be a contract between the states and the bondholders of the Authority.

1970), aff'd 58 *N. J.* 432 (1971); *First Nat'l Bank of Boston v. Main Tpke. Auth.*, 153 *Me.* 131, 136 *A.* 2d 699 (Sup. Jud. Ct. 1957).

[4] The Contract Clause addresses itself not only to the obligation, but also to the remedy and the security furnished to enforce the obligation and assure its performance. The first expression of this view of the Contract Clause occurs in *Green v. Biddle*, 21 *U. S.* (8 *Wheat.*) 1, 5 L. Ed. 547 (1823), which arose out of a compact between Virginia and Kentucky creating the latter as a separate state. Under the terms of the compact Kentucky agreed that all private rights and land titles derived from the laws of Virginia would "remain valid and secure" under Kentucky law. Thereafter, Kentucky enacted a series of laws designed to diminish and impede the remedies available to Virginia claimants to recover possession and the rents and profits of lands occupied by Kentucky residents. In holding the legislation invalid under the Contract Clause, Justice Story said:

> It is no answer that acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." [21 *U. S.* (8 *Wheat.*) at 17].[39]

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[39]Upon rehearing in *Green v. Biddle*, Justice Washington delivered the opinion of the court containing perhaps the most extreme expression of the reach of the Contract Clause rendered by the court:

> The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however, minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. [21 *U. S.* (8 *Wheat.*) at 8488]

In contrast to the language of Justice Story quoted in the text above, Justice Washington states that *any* impairment, whether or not material to the obligation, violates the Contract Clause. It is doubtful whether this view was ever embraced by the court at any time. But see *Planters' Bank of Miss. v. Sharp*, 47 *U. S.* (6 *How.*) 301, 327, 12 L. Ed. 447 (1848); *Ogden v. Saunders*, 25 *U. S.* (12 *Wheat.*) 213, 256, 6 L. Ed. 606 (1827).

In *Von Hoffman v. City of Quincy, supra,* bonds were issued by a city under existing Illinois law which authorized a special property tax to be levied in an amount sufficient to pay the interest on the bonds. The taxes thus collected were to be held in a separate fund specially pledged for the payment of the interest and not to be used for any other purpose. Subsequently, the legislature enacted a statute which limited the rate of property tax that could be levied by municipalities, and repealed the prior law authorizing the levy of a special tax for the benefit of bondholders. The property taxes collected by the city under the new law were insufficient to pay the interest due on the bonds. A bondholder instituted suit against the city and judgment was entered in his favor for the amount of interest owed on the bonds. The city failed to pay the judgment and refused to levy a property tax for such purpose. The judgment creditor thereupon sought a writ of *mandamus* to compel the city to pay the judgment or to levy a special tax. In its defense the city relied upon the repeal legislation as constituting a valid exercise of the state's sovereign power with respect to future public revenues, as to which it urged no binding contract could exist.[40] The court held the repeal legislation to be an invalid impairment under the Contract Clause. The court reaffirmed the doctrine laid down by Justice Story in *Green v. Biddle, supra*, this time describing the prohibited area in terms of an impairment of "substantial" rights, rather than a "material" impairment.

> It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy,

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[40]The Supreme Court had earlier rejected this argument in a different context. See *New Jersey v. Wilson*, 11 *U. S.* (7 *Cranch.*) 164, 3 L. Ed. 303 (1812).

which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the Act is within the prohibition of the Constitution, and to that extent void. [71 *U. S.* at 553].

In its analysis of the issue presented the court viewed the question as addressing itself to the impairment of a remedy. However, the "remedy" in this context is actually the security furnished for the payment of the obligation, *i. e.,* the authorization to levy a special property tax to pay the interest on the bonds.

This line of authority culminates in *W. B. Worthen Co. v. Kavanaugh, supra,* one of the last adjudications by the Supreme Court declaring repeal or amendatory legislation invalid under the Contract Clause. In *Kavanaugh* bonds had been issued by a municipal improvement district organized under the laws of Arkansas. At the time of issuance the statutory scheme to secure payment of the bonds provided for mortgage benefit assessments to be made against each parcel of property which "contained provisions well planned to make these benefit assessments an acceptable security." 295 *U. S.* at 57, 55 S. Ct. at 555. Thereafter, the legislature amended the statute so as to modify the procedures relative to defaulted obligations. The interest and penalties payable on default were substantially reduced, the time in which the property was to be sold for nonpayment was extended from 65 days to 2½ years, and the property owner was permitted to remain in possession with a right of redemption for a further period of four years without accounting for rents. The court struck down the subsequent legislation under the Contract Clause and in the course of doing so it gave a more precise definition of what constitutes a prohibited impairment. Speaking for the court Justice Cardozo said:

In the books there is much talk about distinctions between changes of the substance of the contract and changes of the remedy. * * * The dividing line is at times obscure. There is no need for the

purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. * * * We state the outermost limits only. In stating them we do not exclude the possibility that the bounds are even narrower. The case does not call for definition more precise. A catalogue of the changes imposed upon this mortgage must lead to the conviction that the framers of the amendments have put restraint aside. With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor.

* * * * * * * *

Whether one or more of the changes effected by these statutes would be reasonable and valid if separated from the others, there is no occasion to consider. A state is free to regulate the procedure in its courts even with reference to contracts already made * * * and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up as to make the remedy a shadow. * * * What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security. [295 *U. S.* at 60, 62, 55 S. Ct. at 557].

[5, 6] As the language of the court in the cases cited above makes manifest, not every impairment of a contract obligation or security for its performance runs afoul of the Contract Clause; a state acting under its reserved police powers may alter its remedial processes and thereby diminish contractual security provided it does not destroy its quality as "an acceptable investment for a rational investor." This view of the Contract Clause has its origin in the concurring opinion of Justice Johnson in *Fletcher v. Peck,* 10 *U. S.* (6 *Cranch*) 87, 145, 3 *L. Ed.* 162 (1810). See *Hale, supra* at 873. Justice Johnson's conception of the states' reserved power under the Contract Clause was cogently expressed in his dissenting opinion in *Ogden v. Saunders,* 25 *U. S.* (12 *Wheat.*) 213, 6 L. Ed. 606 (1827), where he said:

> Societies exercise a positive control as well over the inception, construction, and fulfillment of contracts, as over the form and measure of the remedy to enforce them.
> * * * * * * * *
> It is, therefore, far from being true, as a general proposition, "that a government necessarily violates the obligation of a contract which it puts an end to without performance." It is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts. [25 *U. S.* (12 *Wheat.*) at 286, 291.]

[7] Justice Johnson's formulation of the police power doctrine as applied to the Contract Clause was quoted with approval and forms the rationale for the court's decision in *Home B. & L. Ass'n v. Blaisdell,* 290 *U. S.* 398, 428–429, 54 S. Ct. 231, 78 L. Ed. 413 (1933). During the span of more than a century between *Ogden v. Saunders* and *Blaisdell* the court had held on numerous occasions that the states retained the power to impair contractual obligations — including those to which the state was a party — in the exercise of their always reserved police powers to act in the interest of the public health, safety and general welfare.[41] First in dictum, *Boyd v. Alabama,* 94 *U. S.* 645, 650, 24 L. Ed. 302 (1877), and then by direct application of the doctrine, the court held that a lottery franchise granted for a definite term of years could be repealed. *Stone v. Mississippi,* 101 *U. S.* 814, 25 L. Ed. 1079 (1880); *Douglas v. Kentucky,* 168 *U. S.* 488, 18 S. Ct. 199, 42 L. Ed. 553 (1897). In *Northwestern Fertilizing Co. v. Hyde Park,* 97 *U. S.* 659, 24 L. Ed. 1036 (1878), it was held that a franchise to operate a fertilizer factory at a given location could be negated by the exercise of the police power to abate a nuisance. Similarly, the power to control the use of the public streets may not be bargained away, *Atlantic Coast Line R. Co. v. Goldsboro,* 232 *U. S.* 548, 34

[41] For a more detailed discussion of the development of the doctrine, see *Wright, The Contract Clause and the Constitution,* 196–213 (1938).

S. Ct. 364, 58 L. Ed. 721 (1914); *Denver & Rio Grande R. Co. v. Denver,* 250 *U. S.* 241, 39 S. Ct. 450, 63 L. Ed. 958 (1919), nor can the state contractually bind itself not to exercise its power of eminent domain, *West River Bridge Co. v. Dix,* 47 *U. S.* (6 How.) 507, 12 L. Ed. 535 (1848); *Pennsylvania Hospital v. Philadelphia,* 245 *U. S.* 20, 38 S. Ct. 35, 62 L. Ed. 124 (1917), or to change the location of its governmental subdivisions, *Newton v. Mahoning County,* 100 *U. S.* 548, 25 L. Ed. 710 (1880). The broadest expression of this view of the police power during this period is to be found in *Chicago & Alton R. R. v. Tranbarger,* 238 *U. S.* 67, 35 S. Ct. 678, 59 L. Ed. 1204 (1915), where Justice Pitney said:

> It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution [the Contract and Due Process Clauses] has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise * * *. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of public health, morals or safety. [238 *U. S.* at 76–77, 35 S. Ct. at 682]

The issue before the court in *Blaisdell* was the validity of the Minnesota Mortgage Moratorium Law. Once again the question was whether the state could exercise its sovereign power to impair the security provisions for the payment of a debt by a significant alteration of the remedies available for its enforcement. The act provided that during the economic emergency declared to exist, the state courts could upon application and notice extend the period of redemption from foreclosure sales and fix the rental value to be paid by the mortgagor in possession. The act also barred any action for a deficiency judgment until after the expiration of the redemption period. The court upheld the con-

stitutionality of the act, and Chief Justice Charles Evans Hughes described the reach of the Contract Clause:

> To ascertain the scope of the constitutional prohibition, we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.
>
> * * * * * * * *
>
> Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." *Stephenson v. Binford*, 287 *U. S.* 251, 276, 53 *S. Ct.* 181, 189, 77 *L. Ed.* 288. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, — a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court. [290 *U. S.* at 428, 434–5, 54 S. Ct. at 236]

[8–10] The line of demarcation between *Blaisdell* and *Kavanaugh* may be expressed as one of degree: The states' inherent power to protect the public welfare may be validly exercised under the Contract Clause even if it impairs a contractual obligation so long as it does not destroy it. While Blaisdell placed great emphasis upon the emergency character of the Minnesota law to validate the action taken, decisions of the court since then have sanctioned nonemergent legislation impairing contractual rights and remedies where necessary to protect the economic well being of the state. See *Veix v. Sixth Ward B. & L. Ass'n of Newark*, 310 *U. S.* 32, 60 S. Ct. 792, 84 L. Ed. 1061 (1940); *Gelfert v. National City Bank*, 313 *U. S.* 221, 61 S. Ct. 898, 85 L. Ed. 1299 (1941). Furthermore, in keeping with the principles set forth in *Kavanaugh*, we must deal with realities and not abstractions, for "[t]he Constitution is 'in-

tended to preserve practical and substantial rights, not to maintain theories.'" *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 *U. S.* 502, 514, 62 S. Ct. 1129, 1133, 86 L. Ed. 1629 (1942).

The most recent case dealing with the issue, and that upon which defendants place greatest reliance, is *City of El Paso v. Simmons*, 379 *U. S.* 497, 85 S. Ct. 577, 13 L. Ed. 2d 446, reh. den. 380 *U. S.* 926, 85 S. Ct. 879, 13 L. Ed. 2d 813 (1965). The facts of the case may be briefly summarized. Texas law had provided for the sale of public lands on easy credit terms to raise money for school funds and to encourage land settlement. The credit terms set forth in the law governing such sales included a provision permitting the contract owner, were the land forfeited back to the State for nonpayment of interest, an unlimited time in which to reinstate the contract by payment of back interest, subject only to the rights of intervening third persons. In 1941, after a history of land title disputes and rampant speculation in such lands, Texas limited the right of reinstatement to five years. Upon expiration of this five-year period the State would have clear title. Simmons, owner of a quitclaim deed to land contracted for in 1910, had not made timely payment of the interest arrearages. His contract title was forfeited by the state which subsequently transferred the land to the City of El Paso. He instituted suit against the city to determine title to the land, urging that the 1941 law was a violation of the Contract Clause since it not only impaired his contractual right of reinstatement but destroyed it completely.

The 1941 legislation was held by the court to constitute a valid exercise of the state's power to modify or affect the obligation of its contracts. The essential question, in the court's view, was not whether the statute impaired the "obligation" or the "remedy", for not "every modification of a contractual promise * * * [or] every alteration of existing remedies * * * violates the Contract Clause." 379

U. S. at 506–507, 85 S. Ct. at 582. Rather, the question was whether the modification of the contractual obligation to reinstate the purchaser's title was reasonable on the facts disclosed. Citing the legislative history, the court noted that Texas had a vital interest in "the integrity of land titles" and in the administration "of its property in a businesslike manner" (379 *U. S.* at 511–12, 85 S. Ct. at 585) and

> • • • [t]he Contract Clause of the Constitution does not render Texas powerless to take effective and necessary measures to deal with [these matters]. • • • [T]he promise of reinstatement, whether deemed remedial or substantive, was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking. • • • We do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of a defeasible [*sic*] right to reinstatement in case of his failure to perform • • •. We, like the Court in *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 *U. S.* 502, 514, 62 *S. Ct.* 1129, 1135, 86 *L. Ed.* 1629, believe that "[t]he Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' • • •." 379 *U. S.* at 513–515, 85 S. Ct. at 586.
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> • • • • • • • •
>
> The measure taken to induce defaulting purchasers to comply with their contracts • • • was a mild one, indeed, hardly burdensome to the purchaser who wanted to adhere to his contract of purchase, but nonetheless an important one to the State's interest. The Contract Clause does not forbid such a measure. [379 *U. S.* at 516–517, 85 S. Ct. at 588]

The view of the Contract Clause and its subservience to the police power as expressed in *Blaisdell* and *El Paso* coincides with the interpretation placed upon the Contract Clause of the New Jersey Constitution as interpreted by our highest courts. Thus, in *Hourigan v. North Bergen Tp.*, 113 *N. J. L.* 143 (E. & A. 1934), Justice Heher cited *Blaisdell* with approval for the proposition that "the reservation of essential attributes of sovereign power" is to be read into the contracts of the State. He there defined the police power as

> • • • an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people and [it] is paramount to any rights under contracts between individuals. While this power is subject to limitations in certain cases, there is a wide discretion on the part of the legislature in determining what is and what is not necessary — a discretion which courts ordinarily will not interfere with. [at 149]

[11] Neither *New Jersey Highway Auth. v. Sills, supra,* nor *New Jersey Sports & Expos. Auth. v. McCrane,* 61 *N. J.* 1 (1972), app. dism. 409 *U. S.* 943, 93 S. Ct. 270, 34 L. Ed. 2d 215 (1972), suggests that our present Supreme Court has adopted a narrower interpretation of the Contract Clause of either the State or the Federal Constitutions. In *Sills* the court viewed a statute exempting National Guardsmen from the payment of tolls on the Parkway as "ordinary and relatively unimportant legislation" not intended to deal with "any problem of state-wide importance" as was the case in *El Paso* (111 *N. J. Super.* at 320). And in *McCrane* the Supreme Court expressly affirmed that while a contract between the State and the bondholders of an independent governmental authority is entitled to protection under the State and Federal Constitutions, such contracts are nevertheless subject to "a proper exercise of the State's never abdicated police powers." 61 *N. J.* at 26.[42]

[12] The history of the creation and evolution of the Port Authority establishes beyond peradventure that it was intended by the states and by the Congress to perform govern-

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[42] In their brief and at oral argument defendants ask the court to pass upon the validity of the New York repeal act under the New York Constitution. While it would unquestionably be desirable to do so in the interest of resolving all issues within the context of this litigation, that question should be left to the New York courts for decision. *Cf. Interstate Wrecking Co. v. Palisades Interstate Park Comm'n,* 57 *N. J.* 342, 352 (1971). It may be noted that U. S. Trust has filed a declaratory judgment action in the New York Supreme Court which is presently pending.

mental functions necessary and vital to the public safety, health and welfare of the citizens of the two states and the nation as well. *Cf. Comm'r of Int. Rev. v. Ten Eyck,* 76 *F.* 2d 515, 518 (2 Cir. 1935). The states have a continuing interest in and can never abdicate their sovereign powers to control and direct the activities of the Authority to meet the everchanging needs of a complex society. See *Blaisdell, supra,* 290 U. S. at 442, 54 S. Ct. 231. Senator Farley summed it up when he advised Commissioner Kellogg in 1961:

> *** * * I appreciate that if the Legislature directs you to enter into a contract involving the issuance of bonds, there will be no impairment of obligations of contract, but I must call to your attention and the members of your Commission that one Legislature cannot bind a subsequent Legislature involving policy. If, perchance, may I illustrate — ten, fifteen, twenty years from now the respective legislatures of New York and New Jersey importune your Port Authority Commission to do something in addition involving public service, one legislature cannot bind another involving policy. [*Supra* at 157]**

The interest of the states in the development of a coordinated system of public and private transportation within the Port District has been spread on the public record for more than 50 years, and legislative action to accomplish that objective clearly involves an exercise by the states of their fundamental sovereign powers. The enactment of the 1962 covenant was indeed an attempt to satisfy an immediate public need to preserve the H&M as a viable public transportation system. The passage of time and events between 1962 and 1974 satisfied the legislatures of the two states that the public interest which the Port Authority was intended to serve could not be met within the terms of the covenant.

[13, 14] The events which occurred between the passage of the covenant and its repeal are described elsewhere in this opinion (*supra* at 167–176) and need not be detailed again. Suffice it to say that between 1962 and 1974 the security afforded bondholders had been substantially augmented by a vast increase in Authority revenues and reserves, and the Authority's financial ability to absorb greater deficits, from

whatever source and without any significant impairment of bondholder security, was correspondingly increased.[43] During the same interval mass transit facilities within the District continued to deteriorate while the public need for such facilities became unprecedented as the result of the promulgation of stringent federal air pollution regulations designed to reduce automobile usage and the emergence of an energy crisis which threatened the entire system of private automobile transportation in the two States.[44]

"The motive, the policy [and] the object" of the repeal legislation, read against its background, was to further a vital interest of the states which their Legislatures deemed to be essential to the public good. The question is whether the exercise of such power falls within the prohibited scope fo the Contract Clause, or does it, in the language of Chief Justice Hughes in *Blaisdell,* represent "a rational compromise between the individual rights and the public welfare." 290 *U. S.* at 442, 54 S. Ct. at 241.

Conceding the existence of some impairment of bondholder security as a result of the repeal, has the action of

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[43]Between 1961 and 1973 the net revenues of the Authority increased from $68,000,000 to $137,000,000, and over that period the Authority had available to it $582,732,000 in excess of its debt service requirements, after taking into account the deficits of the H&M. Through 1974, the corresponding figures are $161,283,000 and $649,750,000, respectively.

[44]Plaintiff urges that none of the legislative history (detailed at 167–176, *supra*) which preceded the repeal of the covenant should be considered relevant to the question of whether the repeal constituted a reasonable exercise of the states' police powers inasmuch as the repeal legislation was unnecessary and the Legislature made no findings or declarations with respect to such matters. A judgment as to the necessity of the legislation is for the Legislature and not the courts. See *Hourigan v. North Bergen Tp., supra* 113 *N. J. L.* at 149. Nor is the Legislature required to make explicit findings and declarations within the context of the legislation to support an exercise of the police power. See *Gelfert v. Nat'l. City Bank of N. Y., supra* 313 *U. S.* at 235, 61 S. Ct. 898; *Bucsi v. Longworth B. & L. Ass'n,* 119 *N. J. L.* 120, 122 (E. & A. 1937), app. dism. 305 *U. S.* 665, 59 S. Ct. 154, 83 L. Ed. 431 (1938).

the states destroyed the quality of their security as an "acceptable investment for a rational investor"? The repeal, of course, leaves intact the provisions of the CBR and the series resolutions which now constitute, together with the General Reserve Fund Act, the same measure of the bondholders' contractual security rights as existed prior to the enactment of the covenant in 1962. Presumably, rational investors—including plaintiff—purchased hundreds of millions of dollars of consolidated bonds prior to 1962, without the additional security afforded by the covenant and with full knowledge of the power of the states to direct the Authority into mass transit operations. The two principal bond rating services, upon whose judgment the financial community places great reliance, rated the consolidated bonds—minus the covenant—as securities as to which no default was anticipated.

The claim that bondholder security has been materially impaired or destroyed by the repeal is simply not supported by the record. The pledge of the Authority's net revenues and reserves remains intact; the Authority will still be barred from the issuance of any new consolidated bonds unless the 1.3 test required by the CBR is met, and the Authority will continue to be prohibited from the issuance of any consolidated bonds or other bonds secured by a pledge of the general reserve fund without the certification required by section 7 of the series resolutions, to wit, that in the opinion of the Authority the estimated expenditures in connection with any additional facility for which such bonds are to be issued would not, for the ensuing ten years, impair the sound credit standing of the Authority, the investment status of its consolidated bonds, or the Authority's obligations to its consolidated bondholders.

[15] Plaintiff's claim of an unconstitutional impairment is predicated upon such slender reeds as the assertion that the "quality" of the certification required under the CBR and section 7 need not be as "objective" as that required under the covenant; the speculation that the good judgment of the Authority's commissioners in making the necessary

certifications will be overborn by the "political pressures" exerted by the Governors of the States,[45] and the self-flagellating prospect that the states will conspire to "give" the New York City subway system to the Authority and thereby destroy not only the bondholders' security but the Port Authority as well. But as the court stressed in *Faitoute, supra,* constitutional questions must be decided in the world of reality and not by resort to abstract speculations of the kind offered by plaintiff.

[16, 17] The thrust of plaintiff's argument is that any impairment of the security provisions of a contract violates the Contract Clause. It seeks to recreate a theory of the Contract Clause which, if ever imbedded in our constitutional law, no longer exists. As reflected in the course of more than 150 years of its judicial interpretation, the Contract Clause must be construed in harmony with the power of the states to alter or modify their contractual obligations where an important public interest requires. Those who enter into contractual relations with the sovereign, including the bondholders of the Port Authority, are chargeable with the knowledge that it is a sovereign entity with which they are dealing and that "the reservation of [the] essential attributes of sovereign power" is as much a part of their contract as that which is expressly stated.

[18] It is the judgment of this court that the repeal legislation was a reasonable and hence valid exercise of the states' police power which is not prohibited by the Contract Clause of either the Federal or the State Constitution. An order will therefore be entered dismissing the complaint of plaintiff and in favor of defendants on so much of their counterclaim as seeks a declaratory judgment with respect to the constitutional validity of *chapter* 25 of the *Laws of* 1974.

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[45]At the same time plaintiff argues that the covenant's requirement of a certification by the Governors is an "added" protection afforded them by the covenant.

In view of the court's holding in the U. S. Trust action, defendant's third separate defense (asserting the invalidity of the 1962 covenant) and the complaint in the *Gaby* action will be dismissed. See *Wagner v. Ligham*, 37 *N. J. Super.* 430 (App. Div. 1955).

APPENDIX B

The 1962 Covenant

32:1–35.55 Covenant with bondholders; certification by port authority

The 2 States covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, . . . (b) neither the States nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth.

"Affected bonds" as used in this section shall mean bonds of the port authority issued or incurred by it from time to time for any of the purposes of this act or bonds as security for which there may or shall be pledged, in whole or in part, the general reserve fund or any reserve fund established by or pursuant to contract between the port authority and the holders of such bonds, or the revenues of the world trade center, Hudson tubes, Hudson tubes extensions or any other facility owned or operated by the port authority any surplus revenues of which would be payable into the general reserve fund, or bonds both so issued or incurred and so secured.

"Permitted purposes" as used in this section shall mean purposes in connection with (i) the Hudson tubes as authorized and limited on the effective date of this covenant

and agreement, (ii) railroad freight transportation facilities or railroad freight terminal facilities, (iii) the construction, installation and maintenance of railroad tracks and related facilities on vehicular bridges owned by the port authority, and (iv) any other railroad facility established, acquired, constructed or otherwise effectuated by the port authority (including but not limited to Hudson tubes extensions) as to which the port authority shall have first certified either that said other railroad facility is self-supporting as hereinafter defined or, if not, that at the end of the preceding calendar year the general reserve fund contained an amount equal to 1/10 of the par value of bonds of the port authority which were outstanding at said year end and which were legal for investment as defined in the general reserve fund statutes and that the group of facilities consisting of such other railroad facility and of all prior other railroad facilities will not produce deficits in excess of permitted deficits as hereinafter defined. "Prior other railroad facilities" at the time of any certification by the port authority hereunder shall mean all the railroad facilities described in subdivisions (i) and (iv) of this paragraph which were theretofore established, acquired, constructed or otherwise effectuated by the port authority any surplus revenues of which at such time would be payable into the general reserve fund.

An other railroad facility shall be deemed to be "self-supporting" as of the time of any certification hereunder if the amount estimated by the port authority for the ensuing 10 years to be the average annual net income (computed without deduction for debt service) derived from or incidental to such facility equals or exceeds the amount estimated by the port authority for such 10 years to be the

average annual debt service upon bonds for purposes in connection with such proposed facility.

"Deficits" of a group of railroad facilities, as used in this section, shall mean the amount estimated by the port authority for the ensuing 10 years to be the average annual combined debt service upon bonds for purposes in connection with the railroad facilities of such group less the amount estimated by the port authority for such 10 years to be the average annual combined net income (computed without deduction for debt service) derived from or incidental to such railroad facilities or plus the amount estimated by the port authority for such 10 years to be the average annual combined net losses (computed without deduction for debt service) sustained from or incidental to such railroad facilities; the estimate of deficits thus arrived at shall not be effective unless and until concurred in, in writing, by the Governors of the said 2 States.

"Permitted deficits" of a group of railroad facilities as used in this section, shall mean deficits as of the time of any certification hereunder which do not exceed (A) such amount or amounts of deficits as of the time of any certification hereunder for the payment of which 1 or both of the 2 States, in connection with the proposed other railroad facility as to which the certification is made and in connection with prior other railroad facilities, has made adequate, secure and effective provision for the duration of the period for which the port authority is liable for such deficits, plus (B) the greater of the following 2 amounts: (1) an amount equal to 1/10 of the amount in the general reserve fund at the end of the preceding calendar year, diminished by an amount equal to 1% of the principal amount of all bonds of the port authority outstanding at

the end of said preceding calendar year the proceeds of which shall have been applied for purposes in connection with the facilities of such group or (2) an amount equal to the sum of 1/10 of the diminished 1/10 amount calculated under clause (1) of this sentence, plus 1% of the equity, at the end of the said preceding calendar year, of the port authority in its vehicular bridges and tunnels and in all other facilities owned and operated by it (not including railroad cars financed by state-guaranteed bonds) except those of the aforesaid group of railroad facilities. Equity of the port authority in facilities as to which any calculation of equity shall be made shall mean the principal amount of bonds of the port authority retired from port authority revenues or reserves or both which have been derived from the operation of its facilities and the investment of its funds and not from governmental or other subsidy payments, the proceeds of which retired bonds shall have been applied for purposes in connection with such facilities.

Each certification by the port authority hereunder shall be made at the time of the issuance of its first bonds for permitted purposes in connection with a proposed other railroad facility which bonds would be secured in whole or in part by the aforesaid pledged rentals, tolls, fares, fees, charges, revenues or reserves, or at such time, prior to such issuance, as any application of such pledged rentals, tolls, fares, fees, charges, revenues or reserves for purposes in connection with such proposed other railroad facility would otherwise be permitted or required. Anything herein to the contrary notwithstanding, any such certification by the port authority hereunder shall not be effective unless and until affirmatively concurred in, in writing, by the Governors of the said 2 States. L.1962, c. 8, § 6.

Chapter 25, Laws of 1974

AN ACT to repeal section 3 of "An act authorizing the Port Authority of New York and New Jersey to provide improved passenger railroad service as an extension of the Hudson tubes (now known as Port Authority Trans-Hudson) between the cities of Newark and Plainfield in the State of New Jersey, providing that a statutory covenant relating to the application of the revenues and reserves of the port authority shall not extend to the holders of bonds hereafter issued, and amending and supplementing 'An act to provide for the financing and effectuation by the Port of New York Authority of a port development project, consisting of the Hudson tubes, the Hudson tubes extensions and a world trade center, for coordinating, facilitating, and promoting the transportation of persons and the flow and exchange of trade and commerce in and through the Port of New York District, and agreeing with the State of New York with respect thereto,' approved February 13, 1962 (P. L. 1962, c. 8)" approved December 28, 1972 (P.L. 1972, c. 208) and supplementing said act.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

C. 32:1-35.55a Repealer.

1. Section 3 of "An act authorizing the Port Authority of New York and New Jersey to provide improved passenger railroad service as an extension of the Hudson tubes (known as Port Authority Trans-Hudson) between the cities of Newark and Plainfield in the State of New Jersey, providing that a statutory covenant relating to the appli-

cation of the revenues and reserves of the port authority shall not extend to the holders of bonds hereafter issued, and amending and supplementing 'An act to provide for the financing and effectuation by the Port of New York Authority of a port development project, consisting of the Hudson tubes, the Hudson tubes extensions and a world trade center, for coordinating, facilitating, and promoting the transportation of persons and the flow and exchange of trade and commerce in and through the Port of New York District, and agreeing with the State of New York with respect thereto,' approved February 13, 1962 (P. L. 1962, c. 8)," approved December 28, 1972 (P. L. 1972, c. 208, C. 32:1-35.55a) is repealed.

2. If any section, part, phrase, or provision of this repealer act or the application thereof to any person, project or circumstances, be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the section, part, phrase, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this act or the application thereof to other persons, projects or circumstances, and the two states hereby declare that they would have entered into this act or the remainder thereof had the invalidity of such provision or application thereof been apparent.

3. This act shall take effect upon the enactment into law by the State of New York of legislation having an identical effect with this act, but if the State of New York has already enacted such legislation, this act shall take effect immediately.

Approved April 30, 1974.

Notice of Appeal to the Supreme Court of the United States

(*Stamp*)
RECEIVED
MAY 14 1976
SUPREME COURT
OF NEW JERSEY

[Filed: May 14, 1976]

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SUPREME COURT OF NEW JERSEY
Civil Action

Docket No. 11498

UNITED STATES TRUST COMPANY OF NEW YORK, etc.,
Appellant,

—v.—

THE STATE OF NEW JERSEY, *et al.*,
Appellees.

Notice is hereby given that United States Trust Company of New York, the appellant above named, hereby appeals to

the Supreme Court of the United States from the final judgment of the Supreme Court of New Jersey affirming the judgment of the Superior Court of New Jersey, Law Division, Bergen County, in this action, which judgment of the Supreme Court of New Jersey was entered on February 25, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

MEYNER, LANDIS & VERDON
By ROBERT B. MEYNER

CARTER, LEDYARD & MILBURN
By DEVEREUX MILBURN

Supreme Court, U. S.
FILED
AUG 12 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port of Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of The State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

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FILED MAY 21, 1976

PROBABLE JURISDICTION NOTED JUNE 28, 1976

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Exhibit C-18—News Release from Port Authority of New York and New Jersey, April 10, 1975 (Admitted in Evidence at page 880) 405a

Excerpt from Exhibit C-19—Letter of U.S. Department of Transportation to Port Authority of New York and New Jersey with Enclosures (Admitted in Evidence at page 880) 408a

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Supreme Court of New Jersey—Plaintiff's Supplemental Exhibits—(Admitted in Evidence by order dated September 2, 1975) 442a

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Port Authority of New York and New Jersey—Excerpts from Official Statement for Forty-Second Series Consolidated Bonds dated July 8, 1976—this document is subject to judicial notice and was added to Appendix by Stipulation Among Counsel dated July 7, 1976 ..... 519a

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Docket Entries

SUPERIOR COURT OF NEW JERSEY

BERGEN COUNTY

L-26861-73

UNITED TRUST COMPANY OF NEW YORK,
Plaintiff,

—*vs*—

STATE OF NEW JERSEY
(Brendan T. Byrne),
Defendant.

Apr.	30	1974	Complaint $60.00
June	30	1974	Order Ex. Time
July	16	1974	Ans. & C. Cl.
Aug.	2	1974	Ans. to Cl. Cl.
Oct.	24	1974	Order for Class Action
Oct.	24	1974	Affidavit
Nov.	15	1974	Affidavit
Dec.	10	1974	Order for Consolidation (L-2642-71)
Jan.	9	1975	Notice of Deps.
Mar.	27	1975	Order as to Deps. etc.
May	19	1975	Opinion
May	16	1975	Copy of Notice of Appeal, Meyner. L & V 5.00

Dated: 12 July, 1976

I hereby certify that the foregoing is a true copy of the original on file in my office.

Signature Illegible

Clerk

Docket Entries

SUPREME COURT OF NEW JERSEY

From Superior Ct. Law Div.

Trial Docket #L-26861-73

Docket # 11,498
PM
United States Trust Co., of N. Y. v:
Meyner, Landis & Verdon, Esqs.

Attorneys

State of N. J., Brendan T. Byrne, Governor of N. J., etal
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Howard Stern, Esq.
Patrick Falvey, Esq.

Attorneys

5/16/75	Notice of Motion for Direct Certification & Expedition.
5/16/75	Statement in lieu of Brief in Support of Motion.
5/16/75	Afft. in Support of Motion-J. Sinclair Armstrong.
5/16/75	Afft. in Support of Motion-John F. Thompson
5/16/75	Afft. of Service; Rec'd App. Div. Opinion
5/20/75	Cross Motion for Certification-Atty Gen.
5/16/75	Checklist M-824-74 Motion for Direct Cert. is Granted and Appellants Brief due 6-6-75 Respondents Brief due 14 days after Reply Brief 7 days after (if any).
5/28/75	Motion for Certification—Shavick, Esq. $5.00 Paid and Cert. of Serv.
5/28/75	Checklist: M-837-74 Motion for Cross Motion is granted (def-resp.)
5/28/75	M-847-74 Checklist Motion for Certification Granted 5-0.

Docket Entries

6/ 6/75	Appendix and Brief of Cross Appellant
6/11/75	Daniel M. Gaby, Esq.—Shavick, Esq. Afft. Serv. Shavick, Esq.
6/ 6/75	Appellant's Brief—Appendix 4 copies deposition of J. Sinclair Armstrong: 9 copies of S. C. Briefs—findings of fact Meyner, Esq.
6/17/75	Afft. of Serv. Reiner, Esq. (Meyner, Esq.)
6/20/75	Brief of Def-resp. Cross App. State of N. J., Brendan T. Byrne—Wm. Hyland, Atty Gen. (Murray J. Laulicht, Esq.)
6/20/75	Rec'd Defendant's Trial Memorandum, Rec'd Defendant's Post Trial Memorandum, Rec'd Defendant's Proposed Findings of Fact, Rec'd Defendant's Reply Brief and Appendices, (Atty Gen.) Murray J. Laulicht, Esq.
6/20/75	Transcripts—6 vol @ 4 copies each
6/20/75	Brief for Intervening Defendant-Respondent, U. S. Trust Company of New York, Robert B. Meyner, Esq.
6/23/75	Brief for Port Authority Respondents, Francis A. Mulhern, Port Auth.
6/26/75	Notice of Motion to Strike defendants supplemental exhibits or in the alternative to supplement the record, and to supplement the record, Meyner, Esq.
6/26/75	Reply Brief for Appellants and brief on cross appeal, Meyner, Esq.
6/26/75	Memorandum in Support of Motion, Meyner, Esq.
7/ 1/75	Afft. of Service—Meyner, Esq. (U. S. Trust Co.) Gaby vs. Port of N. Y. Authority.

Docket Entries

7/ 1/75	Afft. of Service—Meyner, Esq. (U. S. Trust Co.) U. S. Trust vs. State, etc., etal.
7/ 3/75	Memorandum in Opposition to Motion, Atty Gen.
7/ 3/75	Notice of Motion for Leave to file oversized brief and ext. time to file reply brief, Atty Gen.
7/ 7/75	Notice of Motion to Relax Page Limitations Statement in Lieu of Brief in Support of Motion—Afft. in Support, Afft. Serv., Meyner, Esq.
7/11/75	Reply Brief, Lowenstein, Esq.
7/14/75	Plaintiffs' Reply Memorandum—Meyner, Esq.
7/22/75	Notice of Motion to Suppress Points I and II of Reply Brief of def-resp. and Cross-Appellants.
7/22/75	Memorandum in support of motion.
7/22/75	Afft. of Serv., Meyner, Landis & Verdon, Esqs.
7/29/75	Memorandum in Opposition to Motion to Suppress Points 1 and 2 of Reply Brief—Atty Gen.
9/ 2/75	Joint Appnx. Vol. VI—Meyner, Landis & Verdon, Esqs.
9/ 2/75	Checklist M-1067-74 Motion to strike is denied.
9/ 2/75	Checklist M-1068-74 Motion to supplement the record is granted.
9/ 2/75	Checklist M-1069-74 Motion for extension of time is granted.
9/ 2/75	Checklist M-1070-74 Motion to file oversized reply brief is granted.
9/ 2/75	Checklist M-1071-74 Motion to file oversized brief is granted.

Docket Entries

9/ 2/75	Checklist M-1072-74 Motion to suppress points 1 and 2 of reply brief is denied.
10/ 1/75	Supplemental Letter—Meyner, Landis & Verdon.
10/ 7/75	Afft. of Service of suppl. letter—Meyner, Landis.
2/25/76	Opinion—6-1-P.C.—Affirm—8 Pg. Pashman-Conc. Part-Diss Part.
3/ 8/76	Motion for Counsel Fees with Afft. & Brief & Shavick, Stern, Schotz, Steiger & Croland, Esqs. $5.
3/10/76	Afft. of Service on Motion for Counsel Fees—Shavick, Stern, Schotz, Steiger & Croland, Esqs.
3/11/76	Supp. Letter to Motion for Counsel Fees—Shavick, Esq.
3/22/76	Brief for Port Authority in Opposition to Motion for Counsel Fees—Mulhern, Esq.
4/19/76	Response to Motion for Counsel Fees—Mulhern.
4/26/76	Suppl. Letter—Howard Stern, Esq.
5/ 4/76	Motion for Counsel Fees *Denied;* M-925-75; 6-1.
5/14/76	Notice of Appeal to the U.S. Supreme Ct.
5/14/76	Afft. of Service—Meyner, Landis & Verdon, Esqs.
5/24/76	Notice of Appeal to the U.S. Supreme Ct.
5/24/76	Afft. of Service—Shavick, Stern, Schotz, Steiger & Croland, Esqs.

Complaint

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION — BERGEN COUNTY

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series; on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Plaintiff,

against

THE STATE OF NEW JERSEY; BRENDAN T. BYRNE, Governor of The State of New Jersey; and WILLIAM F. HYLAND, Attorney General of The State of New Jersey,

Defendants.

Plaintiff, United States Trust Company of New York (hereinafter referred to as the "Trust Company"), a corporation organized and existing under the laws of the State of New York, having its principal place of business at 45 Wall Street, New York, New York, for its complaint against the defendants says:

FIRST COUNT

1. The Trust Company is the Trustee for The Port Authority of New York and New Jersey (hereinafter referred to as "The Port Authority") Consolidated Bonds, Fortieth and Forty-First Series, and is also the holder, for its own account and as a fiduciary, of Consolidated Bonds of The Port Authority.

2. Defendant The State of New Jersey along with the State of New York, is a party to a contract with bondholders (including the plaintiff) made by the Legislatures of New Jersey and New York through concurring legislation becoming effective in 1962 and set forth in N.J.S.A. 32:1-35.55 and N.Y. Unconsol. Laws §6606, all as hereinafter described.

3. Defendant Brendan T. Byrne is the Governor of the State of New Jersey and in such capacity possesses the power to appoint Commissioners, to veto any and all action taken at meetings of The Port Authority by the Commissioners appointed by the Governor and generally to establish the policy, planning, guidance and direction for the operations of The Port Authority.

4. Defendant William F. Hyland is the Attorney General of the State of New Jersey and in such capacity is charged with the duty to uphold the Constitution of the State of New Jersey and the United States Constitution.

5. The Trust Company brings this action as the Trustee for The Port Authority Consolidated Bonds, Fortieth and Forty-First Series, pursuant to Section 8 of the Resolution Establishing the Fortieth Series of Consolidated Bonds, due 2008 adopted May 10, 1973 and the Resolution Establishing the Forty-First Series of Consolidated Bonds, due 2008 adopted September 13, 1973.

6. Pursuant to such Section 8 of the respective Resolutions adopted by The Port Authority the Trust Company is "authorized to act in its discretion to assure that all of the rights of and obligations to the holders of bonds of [such] Series are unconditionally recognized, protected and fulfilled." Such Resolutions also permit the Trust Company "to institute any action on behalf of the holders of bonds of

[such] Series against [The Port Authority] or others which it shall in its sole discretion deem advisable . . ."

7. The Trust Company also brings this action on its own behalf as the holder (in its own account, as custodian and in its several fiduciary capacities) of approximately $96,000,00 principal amount (as of April 15, 1974) of the Consolidated Bonds of The Port Authority and on behalf of all of the holders of Consolidated Bonds of The Port Authority who have an undivided interest in the revenues of The Port Authority and the reserve funds securing such Consolidated Bonds.

8. As of April 15, 1974, approximately $1,600,000,000 principal amount of Consolidated Bonds of The Port Authority were outstanding and held by banks, trust companies, other financial institutions, pension funds and private individuals.

9. The members of the class of persons whose interests will be affected by the outcome of this action are so numerous that joinder of all members is impracticable.

10. The questions of law and fact raised by this action are common to all of the members of the class and the claims made by the Trust Company are typical of the claims of the class.

11. The Trust Company will fairly and adequately protect the interests of the class.

12. Inconsistent or varying adjudications with respect to individual members of the class would establish incompatible standards of conduct for parties opposing the class or substantially impair or impede their ability to protect their interests.

13. An adjudication with respect to the issues raised by the Trust Company will as a practical matter be dispositive of the interests of the other members of the class.

14. The defendants in this action have acted on grounds generally applicable to the class, thereby making appropriate declaratory and other relief with respect to the class as a whole.

15. This Court has jurisdiction over the claims asserted herein under N.J.S. 2A:16-50 et seq., the New Jersey Uniform Declaratory Judgments Act.

16. The Port Authority is a municipal corporate instrumentality of the State of New Jersey (N.J.S.A. 32:1-1 to 24) and of the State of New York (N.Y. Unconsol. Laws §§6401-6423), created in 1921 by compact between the two states with the consent of the Congress of the United States (Public Resolution No. 17, 67th Congress, First Session (42 Stat. 174)), pursuant to Article 1, Section 10, clause 3 of the United States Constitution.

17. The Compact between the States of New Jersey and New York in 1921 which created The Port Authority (the "Port Compact") stated that the development of the Port "will require the expenditure of large sums of money and the cordial cooperation of the States of New York and New Jersey in the encouragement of the investment of capital. . . ." Article VI authorized The Port Authority "to borrow money and secure the same by bonds or by mortgages." Article VII provided that "[The Port Authority] shall not pledge the credit of either state except by and with the authority of the legislature thereof." Article XV provided that "Unless and until the revenues from operations conducted by [The Port Authority] are adequate to meet all expenditures," the States would each appropriate up to

$100,000 a year to finance its operations. Thus the Port Compact, to which Congress consented, intended The Port Authority to be a self-supporting agency of State government.

18. The Port Authority secures the funds necessary for its various authorized projects primarily through the issuance of bonds. Since 1952 The Port Authority has issued 41 Series of Consolidated Bonds secured by the full faith and credit of The Port Authority, a pledge of the net revenues of all existing facilities of The Port Authority, the net revenues of new facilities financed through Consolidated Bonds, a general reserve fund and a consolidated bond reserve fund.

19. In 1962 the Legislatures of New Jersey and New York adopted concurring legislation (the "1962 Covenant") providing that:

> "The two states covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, (a) the two states will not diminish or impair the power of the port authority (or any subsidiary corporation incorporated for any of the purposes of this act) to establish, levy and collect rentals, tolls, fares, fees or other charges in connection with any facility constituting a portion of the port development project or any other facility owned or operated by the port authority of which the revenues have been or shall be pledged in whole or in part as security for such bonds (directly or indirectly, or through the medium of the general reserve fund or otherwise)

> or to determine the quantity, quality, frequency or nature of the service provided in connection with each such facility; and (b) neither the states nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth.
>
> 'Affected bonds' as used in this section shall mean bonds of the port authority issued or incurred by it from time to time for any of the purposes of this act or bonds as security for which there may or shall be pledged, in whole or in part, the general reserve fund or any reserve fund established by or pursuant to contract between the port authority and the holders of such bonds, or the revenues of the world trade center, Hudson tubes, Hudson tubes extensions or any other facility owned or operated by the port authority any surplus revenues of which would be payable into the general reserve fund, or bonds both so issued or incurred and so secured.
>
> 'Permitted purposes' as used in this section shall mean purposes in connection with (i) the Hudson tubes as authorized and limited on the effective date of this covenant and agreement, (ii) railroad freight transportation facilities or railroad freight terminal facilities, (iii) the construction, installation and maintenance of railroad tracks and related facilities on vehicular bridges owned by the port authority and (iv) any other railroad facility established, acquired, constructed or otherwise effectuated by the port authority (including but not limited to Hudson tubes

extensions) as to which the port authority shall have first certified either that said other railroad facility is self-supporting as hereinafter defined or, if not, that at the end of the preceding calendar year the general reserve fund contained an amount equal to one-tenth of the par value of bonds of the port authority which were outstanding at said year end and which were legal for investment as defined in the general reserve fund statutes and that the group of facilities consisting of such other railroad facility and of all prior other railroad facilities will not produce deficits in excess of permitted deficits as hereinafter defined. 'Prior other railroad facilities' at the time of any certification by the port authority hereunder shall mean all the railroad facilities described in subdivisions (i) and (iv) of this paragraph which were theretofore established, acquired, constructed or otherwise effectuated by the port authority any surplus revenues of which at such time would be payable into the general reserve fund.

An other railroad facility shall be deemed to be 'self-supporting' as of the time of any certification hereunder if the amount estimated by the port authority for the ensuing ten years to be the average annual net income (computed without deduction for debt service) derived from or incidental to such facility equals or exceeds the amount estimated by the port authority for such ten years to be the average annual debt service upon bonds for purposes in connection with such proposed facility.

'Deficits' of a group of railroad facilities, as used in this section, shall mean the amount estimated by the port authority for the ensuing ten years to be the average annual combined debt service upon

bonds for purposes in connection with the railroad facilities of such group less the amount estimated by the port authority for such ten years to be the average annual combined net income (computed without deduction for debt service) derived from or incidental to such railroad facilities or plus the amount estimated by the port authority for such ten years to be the average annual combined net losses (computed without deduction for debt service) sustained from or incidental to such railroad facilities; the estimate of deficits thus arrived at shall not be effective unless and until concurred in, in writing, by the governors of the said two states.

'Permitted deficits' of a group of railroad facilities as used in this section, shall mean deficits as of the time of any certification hereunder which do not exceed (A) such amount or amounts of deficits as of the time of any certification hereunder for the payment of which one or both of the two states, in connection with the proposed other railroad facility as to which the certification is made and in connection with prior other railroad facilites, has made adequate, secure and effective provision for the duration of the period for which the port authority is liable for such deficits, plus (B) the greater of the following two amounts: (1) an amount equal to one-tenth of the amount in the general reserve fund at the end of the preceding calendar year, diminished by an amount equal to one per cent of the principal amount of all bonds of the port authority outstanding at the end of said preceding calendar year the proceeds of which shall have been applied for purposes in connection with the facilities of such group or (2) an amount equal to the sum of one-tenth of the

diminished one-tenth amount calculated under clause (1) of this sentence, plus one percent of the equity, at the end of the said preceding calendar year, of the port authority in its vehicular bridges and tunnels and in all other facilities owned and operated by it (not including railroad cars financed by state-guaranteed bonds) except those of the aforesaid group of railroad facilities. Equity of the port authority in facilities as to which any calculation of equity shall be made shall mean the principal amount of bonds of the port authority retired from port authority revenues or reserves or both which have been derived from the operation of its facilities and the investment of its funds and not from governmental or other subsidy payments, the proceeds of which retired bonds shall have been applied for purposes in connection with such facilities.

Each certification by the port authority hereunder shall be made at the time of the issuance of its first bonds for permitted purposes in connection with a proposed other railroad facility which bonds would be secured in whole or in part by the aforesaid pledged rentals, tolls, fares, fees, charges, revenues or reserves, or at such time, prior to such issuance, as any application of such pledged rentals, tolls, fares, fees, charges, revenues or reserves for purposes in connection with such proposed other railroad facility would otherwise be permitted or required. Anything herein to the contrary notwithstanding, any such certification by the port authority hereunder shall not be effective unless and until affirmatively concurred in, in writing, by the governors of the said two states." N.J.S.A. 32:1-35.55; N.Y. Unconsol. Laws § 6606.

20. The 1962 Covenant set forth in paragraph 19 of this Complaint was enacted into law since in the early 1960's it was proposed that The Port Authority be authorized to assume the responsibility for a commuter rail line by acquiring the deficit generating operations of the Hudson & Manhattan Railroad Company (now called, and referred to herein as the "PATH System"). This interurban electric railroad system has termini in Newark, Hoboken and Manhattan.

21. In connection with the legislation which authorized The Port Authority to assume responsibility for the PATH System, The Port Authority had advised the New York and New Jersey Legislatures that the credit of The Port Authority would be impaired by such an undertaking of an anticipated continuing deficit facility unless the States would enter into an enforceable contract with The Port Authority bondholders which would protect bondholders against dilution of already pledged revenues and reserves by any additional passenger rail deficits beyond those of the basic PATH System. The 1962 Covenant was the legislation finally adopted.

22. The Port Authority advised potential investors of the existence of and protection afforded by the 1962 Covenant in Official Statements distributed in connection with each of the following Consolidated Bond financings:

a) $35,000,000 Consolidated Bonds Twentieth Series, Due 1993 (First Installment) April 24, 1962;

b) $25,000,000 Consolidated Bonds Twenty-First Series, Due 1993 (First Installment) October 3, 1962;

c) $25,000,000 Consolidated Bonds Twenty-Second Series, Due 1993 (First Installment) December 12, 1962;

d) $25,000,000 Consolidated Bonds Twenty-Third Series, Due 1994 (First Installment) May 7, 1963;

e) $25,000,000 Consolidated Bonds Twenty-Fourth Series, Due 1994 (First Installment) October 16, 1963;

f) $30,000,000 Consolidated Bonds Twenty-Fifth Series, Due 1965-1984, February 13, 1964;

g) $35,000,000 Consolidated Bonds Twenty-Sixth Series, Due 1995 (First Installment) May 26, 1964;

h) $25,000,000 Consolidated Bonds Twenty-Seventh Series, Due 1995 (First Installment) November 10, 1964;

i) $25,000,000 Consolidated Bonds Twenty-Eighth Series, Due 1996 (First Installment) January 11, 1965;

j) $25,000,000 Consolidated Bonds Twenty-Ninth Series, Due 1996 (First Installment) May 27, 1965;

k) $25,000,000 Consolidated Bonds Thirtieth Series, Due 1998 (First Installment) October 27, 1965;

l) $100,000,000 Consolidated Bonds Thirty-First Series, Due 2002 (First Installment) March 22, 1967;

m) $100,000,000 Consolidated Bonds Thirty-Second Series, Due 2003 (First Installment) February 26, 1968;

n) $100,000,000 Consolidated Bonds Thirty-Third Series, Due 2003 (First Installment) July 31, 1968;

o) $100,000,000 Consolidated Bonds Thirty-Fourth Series, Due 2003 (First Installment) December 17, 1968;

p) $100,000,000 Consolidated Bonds Thirty-Fifth Series, Due 2005 (First Installment) August 26, 1970;

q) $50,000,000 Consolidated Bonds Thirty-Sixth Series, Due 2005 (First Installment) November 24, 1970;

r) $100,000,000 Consolidated Bonds Thirty-Seventh Series, Due 2006 (First Installment) February 18, 1971;

s) $100,000,000 Consolidated Bonds Thirty-Eighth Series, Due 2006 (First Installment) October 13, 1971;

t) $150,000,000 Consolidated Bonds Thirty-Ninth Series, Due 2007 (First Installment) February 2, 1972.

23. The Port Authority's advice to potential investors described in paragraph 22 of this Complaint, was substantially equivalent to the following disclosure, contained in the Official Statement for the Thirty-Ninth Series Consolidated Bonds:

> "In connection with the legislation which authorized the Port Authority to assume responsibility for the Hudson Tubes System, the Port Authority had advised the Legislatures of both States that the credit of the Port Authority would be impaired by such an undertaking of an anticipated perpetual deficit facility unless the States would enter into an enforceable contract with the Port Authority bondholders which would grant assurances against dilution of already pledged revenues and reserves by any additional passenger rail deficits beyond those of the basic Hudson Tubes system. The legislation as finally adopted includes such statutory covenants. The covenants are between the two States and with the holders of certain described 'affected' bonds which include all Consolidated Bonds including those of the present offering. The contract prohibits the application of any revenues or reserves pledged to such bonds (which includes all existing revenues, other than rentals under the New York State's Com-

muter Railroad Car Program described on pp. 18-19, and all existing reserves) for any additional passenger railroad purpose beyond the basic Hudson Tubes, as defined, without the consent of the holders of such affected bonds as provided in their contract with the Authority unless the Port Authority shall have first certified the eligibility of such additional railroad, whether it be a Hudson Tubes extension, as defined, or new railroad facility. To be eligible the Port Authority must determine either that the proposed additional passenger railroad facility is self-supporting or, if not, that at the end of the preceding calendar year the General Reserve Fund contained the full statutory amount and that for the ensuing ten years the estimated average annual deficits from the proposed additional passenger railroad facility and any then existing Port Authority passenger railroad facility (including the basic Hudson Tubes) would not in the aggregate exceed an amount equal to one-tenth of the amount in the General Reserve Fund at the prior year end. Certain adjustments to this figure are provided by the statute. For example, the amount equal to one-tenth of the General Reserve Fund is to be diminished by an amount equal to 1% of the principal amount of Port Authority bonds the proceeds of which shall have been applied for passenger railroad purposes; this prevents the enlargement of deficit capacity by bonds issued in connection with a deficit passenger railroad facility. Furthermore, if at some time in the future the adjusted 10% of the General Reserve Fund should be exceeded by an amount equal to 1% of the Port Authority's equity, as defined in the statutes, augmented by 1/10 of that

adjusted 10%, then the augmented 1% of the equity may be used as the limiting figure instead of the percentage of the General Reserve Fund. Section 6 of the 1962 legislation (See Appendix III) should be studied for the exact terms of the statutory covenant."

24. Purchasers of Consolidated Bonds of The Port Authority following enactment of the 1962 Covenant relied on the 1962 Covenant in making their purchase.

25. The legislation embodying the 1962 Covenant was amended effective May 10, 1973 by the States of New Jersey and New York (Ch. 208, Laws of New Jersey 1972, Ch. 1003, Laws of New York 1972, Ch. 318, Laws of New York 1973), to limit the application of the 1962 Covenant to obligations of The Port Authority issued before May 10, 1973. Since Consolidated Bonds issued prior to that date have varying maturity dates from 1993 to 2007, the 1962 Covenant remains binding on The Port Authority, and, thereby, affords protection through 2007 for the bonds of the Fortieth Series and subsequent issues even though it does not specifically apply to such bonds.

26. The Port Authority advised potential investors of the existence of and continued protection afforded by the 1962 Covenant in Official Statements distributed in connection with the Fortieth and Forty-First Series of Consolidated Bonds as follows:

> "The statutory covenant against dilution of pledged revenues and reserves by additional passenger railroad facilities, which is discussed in the paragraph quoted above, remains in effect with respect to affected bonds, and remains binding on the Authority although it does not apply to the bonds

of the present offering. The legislation which authorized the Port Authority to assume responsibility for the Hudson Tubes system was amended, effective May 10, 1973, by the States of New York and New Jersey (Ch. 1003, Laws of New York 1972, Ch. 318, Laws of New York 1973; Ch. 208, Laws of New Jersey). The New Jersey amendment, when introduced in the New Jersey Assembly, was accompanied by a statement that the bill was intended to preclude the application of the covenant to holders of bonds newly issued after its effective date, while maintaining in status quo the rights of the holders of the bonds issued after March 27, 1962 (the effective date of the covenant legislation) but prior to the effective date of the amendment."

27. Purchasers of Consolidated Bonds of The Port Authority following the prospective repeal of the 1962 Covenant relied on the continued protection afforded by the 1962 Covenant in making their purchase.

28. On April 30, 1974, defendant Byrne signed into law an Act of the Legislature of the State of New Jersey (Assembly Bill No. 1304) (the "Act").

29. The Act purports to repeal the 1962 Covenant retroactively to the date of its enactment, to be effective upon the passage of concurring legislation by the State of New York.

30. Although effectiveness of the Act is conditioned upon concurring action by the State of New York, as a result of the expressed intent of defendant Byrne and the Legislature of the State of New Jersey to pass the Act and as a result of the passage of the Act the contract between the States of New York and New Jersey and holders of

Consolidated Bonds has been impaired and the secondary market for Consolidated Bonds of The Port Authority has been and will continue to be adversely affected to the detriment of the Trust Company and all holders of Consolidated Bonds of The Port Authority.

31. The 1962 Covenant constitutes a contract as that term is used in Article 4, Section 7, paragraph 3 of the New Jersey Constitution.

32. The passage of the Act alleged in paragraph 28 of this Complaint constitutes an impairment of the contract among the States of New Jersey and New York and all holders of Consolidated Bonds of The Port Authority, in violation of Article 4, Section 7, paragraph 3 of the New Jersey Constitution.

SECOND COUNT

1. The Trust Company repeats and realleges paragraphs 1 through 30 of the First Count of this Complaint as if set forth fully herein.

2. The 1962 Covenant constitutes a contract as that term is used in Article 1, Section 10, Clause 1 of the United States Constitution.

3. The passage of the Act alleged in paragraph 28 of this Complaint constitutes an impairment of the contract among the States of New Jersey and New York and all holders of Consolidated Bonds of The Port Authority, in violation of Article 1, Section 10, Clause 1 of the United States Constitution.

THIRD COUNT

1. The Trust Company repeats and realleges paragraphs 1 through 30 of the First Count of this Complaint as if set forth fully herein.

2. The 1962 Covenant is property as that term is used in Article 1, paragraphs 1 and 20 of the New Jersey Constitution.

3. The passage of the Act alleged in paragraph 28 of this Complaint constitutes a taking of property of the holders of Consolidated Bonds of The Port Authority for public use without just compensation in violation of Article 1, paragraph 1 and Article 1, paragraph 20 of the New Jersey Constitution.

FOURTH COUNT

1. The Trust Company repeats and realleges paragraphs 1 through 30 of the First Count of this Complaint as if set forth fully herein.

2. The 1962 Covenant is property as that term is used in the Fifth and Fourteenth Amendments to the United States Constitution.

3. The passage of the Act alleged in paragraph 28 of this Complaint constitutes a taking of private property of the holders of Consolidated Bonds of The Port Authority without just compensation in violation of the Fifth Amendment and the Fourteenth Amendment to the United States Constitution.

WHEREFORE, The Trust Company demands:

(a) A declaratory judgment that the enactment of Assembly Bill No. 1304 was in violation of Article IV, Section 7, paragraph 3 of the New Jersey Constitution and that as a consequence thereof Assembly Bill No. 1304 was not lawfully enacted, is void and is of no consequence or effect.

(b) A declaratory judgment that the enactment of Assembly Bill No. 1304 was in violation of Article I, Section

10, Clause 1 of the United States Constitution and that as a consequence thereof Assembly Bill No. 1304 was not lawfully enacted, is void and is of no consequence or effect.

(c) A declaratory judgment that the enactment of Assembly Bill No. 1304 was in violation of Article I, paragraphs 1 and 20 of the New Jersey Constitution and that as a consequence thereof Assembly Bill No. 1304 was not lawfully enacted, is void and is of no consequence or effect.

(d) A declaratory judgment that the enactment of Assembly Bill No. 1304 was in violation of the Fifth and Fourteenth Amendments to the United States Constitution and that as a consequence thereof Assembly Bill No. 1304 was not lawfully enacted, is void and is of no consequence or effect.

(e) Such other and further relief as the Court may deem just and proper.

Dated: Newark, New Jersey
April 30, 1974

MEYNER, LANDIS & VERDON
Attorneys for Plaintiff

By ROBERT B. MEYNER
Robert B. Meyner

Of Counsel:
CARTER, LEDYARD & MILBURN
2 Wall Street
New York, New York 10005

Answer and Counterclaim

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—BERGEN COUNT

UNITED STATES TRUST COMPANY OF NEW YORK, etc.,
Plaintiff,

—vs—

THE STATE OF NEW JERSEY, et als.,
Defendants.

Defendants, answering plaintiff's complaint, say:

FIRST COUNT

1. They admit that The Trust Company is The Trustee for the Fortieth and Forty-First Series of Port Authority Consolidated Bonds and they deny knowledge or information sufficient to form a belief with respect to the truth of the allegation that The Trust Company is the holder of Consolidated Bonds of The Port Authority.

2. They deny the allegations of paragraph 2, except that they admit that the concurring legislation referred to therein was enacted by the respective Legislatures of New Jersey and New York.

3. They deny the allegations of paragraph 3, except that they admit that defendant Byrne is the Governor of the State of New Jersey and in such capacity possesses the power to appoint six Commissioners of The Port Authority by and with the advice and consent of the Senate of New Jersey and to veto action taken by the Commissioners appointed from New Jersey and recited in minutes of Port Authority meetings.

4. They admit the allegations of paragraph 4.

5. They admit that plaintiff purports to bring this action on the basis alleged.

6. They admit the allegations of paragraph 6.

7. They deny knowledge or information sufficient to form a belief with respect to the truth of the allegations of paragraph 7, except that they admit that the plaintiff purports to bring this action on the basis alleged.

8. They deny knowledge or information sufficient to form a belief with respect to the truth of the allegations of paragraph 8.

9. They admit the allegations of paragraph 9.

10. They admit that the questions raised by this action, including the counterclaim, are common to all members of the class or classes and that the claims made by plaintiff are typical of the claims of the class or classes.

11. They admit on information and belief the allegations of paragraph 11.

12. They admit the allegations of paragraph 12.

13. They admit on information and belief that adjudication with respect to the issues raised by the complaint and counterclaim will as a practical matter be dispositive of the interests of the other members of the class or classes.

14. They admit the allegations of paragraph 14.

15. They admit the allegations of paragraph 15.

16. They admit the allegations of paragraph 16 and they allege that the consent of the Congress was also given pursuant to Article 1, Section 8, Clause 3 of the Constitution of the United States.

17. They admit that the Compact contains the provisions alleged in the first four sentences contained in paragraph 17, but they refer to the entire Compact for the full terms and legal effect thereof. They deny the last sentence of paragraph 17.

18. They deny the first sentence of paragraph 18 and admit the second sentence of paragraph 18.

19. They admit the allegations of paragraph 19.

20. They deny the first sentence of paragraph 20 and admit the second sentence of paragraph 20.

21. They deny the allegations of paragraph 21, except that they admit that the advice alleged therein was given to the Legislatures of New York and New Jersey by certain members of the then management of The Port Authority and they refer to the entire testimony for the full terms and effect thereof.

22. They deny the allegations of paragraph 22, except that they admit that the Official Statements listed therein refer to the 1962 Covenant and they refer to the entire Official Statements for the full terms and effect thereof.

23. They deny the allegations of paragraph 23, except that they admit that a statement similar in substance to the alleged statement was contained in the Official Statements referred to in paragraphs 22 and 23 and they refer to the entire Official Statements for the full terms and effect thereof.

24. They deny the allegations of paragraph 24.

25. They deny the allegations of paragraph 25.

26. They deny the allegations of paragraph 26, except that they admit that the Official Statements referred to

therein contained the statement quoted therein and they refer to the entire Official Statements for the full terms and effect thereof. Further answering paragraph 26, they allege that the Official Statements referred to therein explicitly stated that the statement quoted in paragraph 23 of the complaint *"does not apply to bonds of the present offering"* (emphasis in original).

27. They deny the allegations of paragraph 27.

28. They admit the allegations of paragraph 28.

29. They deny the allegations of paragraph 29.

30. They deny the allegations of paragraph 30, except that they admit that the effectiveness of the Act (Chapter 25 of the Laws of New Jersey 1974, hereinafter "the 1974 Act") is conditioned upon concurring action by the State of New York and they allege that New York has taken such concurring action by enacting Chapter 993 of the Laws of New York 1974, which is substantially identical to the 1974 Act.

31. They deny the allegations of paragraph 31.

32. They deny the allegations of paragraph 32.

SECOND COUNT

1. They repeat and reallege, as if set forth herein at length, their answer to paragraphs 1 through 30 of the First Count.

2. They deny the allegations of paragraph 2.

3. They deny the allegations of paragraph 3.

THIRD COUNT

1. They repeat and reallege, as if set forth herein at length, their answer to paragraphs 1 through 30 of the First Count.

2. They deny the allegations of paragraph 2.

3. They deny the allegations of paragraph 3.

FOURTH COUNT

1. They repeat and reallege, as if set forth herein at length, their answer to paragraphs 1 through 30 of the First Count.

2. They deny the allegations of paragraph 2.

3. They deny the allegations of paragraph 3.

FIRST SEPARATE DEFENSE

The complaint fails to state a claim for relief against Governor Byrne or Attorney General Hyland.

SECOND SEPARATE DEFENSE

The 1974 Act constitutes a reasonable exercise of the police powers of the State of New Jersey to protect the health, safety and welfare of its citizens. These police powers are fundamental to the sovereignty of the State and cannot be abdicated.

THIRD SEPARATE DEFENSE

1. Pursuant to the Interstate Commerce and Interstate Compact clauses of the Constitution of the United States, Congress consented to the Port Authority Compact and Comprehensive Plan.

2. The Preamble to the Port Authority Compact, to which Congress consented, provided:

> "It is confidently believed that a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey."

3. Subparagraph b of the 1962 Covenant (which was repealed by the 1974 Act) violated the provisions of the Port Authority Compact because it substantially precluded participation by The Port Authority in the field of passenger railroad operations other than the PATH system and thereby impeded the ability of The Port Authority to effect "a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York".

4. Subparagraph b of the 1962 Covenant was unconstitutional and invalid because Congress never consented to the limitations imposed by this provision upon The Port Authority or the burden imposed by this provision upon interstate commerce in the Port District.

FOURTH SEPARATE DEFENSE

1. The 1974 Act repealed only that part of the 1962 Covenant (subparagraph b) which substantially precluded The Port Authority's participation in passenger railroad operations other than the PATH system.

2. The 1974 Act does not purport to repeal or impair the primary obligation of The Port Authority to its bondholders, which is to pay interest and principal when due.

3. The 1974 Act does not purport to repeal or impair that part of the 1962 Covenant (subparagraph a) which provides that the States of New Jersey and New York

> "will not diminish or impair the power of the port authority (or any subsidiary corporation incorporated for any of the purposes of this act) to establish, levy and collect rentals, tolls, fares, fees or other charges in connection with any facility constituting a portion of the port development project or any other facility owned or operated by the port authority of which the revenues have been or shall be pledged in whole or in part as security for such bonds (directly or indirectly, or through the medium of the general reserve fund or otherwise), or to determine the quantity, quality, frequency or nature of the service provided in connection with each such facility."

4. The 1974 Act does not purport to repeal or impair Section 3 of the Consolidated Bond Resolution (prohibiting the issuance of Consolidated Bonds unless revenues are at least 1.3 times debt service) or Section 7 of the Resolutions authorizing specific series of Consolidated Bonds (prohibiting the issuance of bonds secured by the General Reserve Fund for any additional facility unless the Authority certifies that the issuance "will not . . . materially impair the sound credit standing of the Authority or the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments . . . including its undertakings to the holders of Consolidated Bonds").

5. The 1974 Act does not, therefore, impair the obligation of a contract or take property within the meaning of the Constitutions of the United States or New Jersey.

FIFTH SEPARATE DEFENSE

1. Bonds isued by The Port Authority do not refer to the 1962 Covenant. Rather, the bonds state that they are issued "in conformity with the Compact . . . and the various statutes of [New Jersey and New York] amendatory thereof and supplemental thereto."

2. Article VII of the Port Authority Compact, as approved by the Congress, provides:

> "The port authority shall have such additional powers and duties as may hereafter be delegated or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other."

3. Port Authority bonds were purchased with notice that the Legislatures of New Jersey and New York reserved the powers to impose additional duties upon The Port Authority.

4. The 1974 Act constitutes a permissible exercise by the States of New Jersey and New York of their specifically reserved powers to impose additional duties upon The Port Authority.

SIXTH SEPARATE DEFENSE

1. The Port Authority's powers and responsibilities pursuant to the Port Authority Compact include provision of passenger transportation facilities within the Port District. In exercising those powers and responsibilities to date, The Port Authority has been principally concerned with providing facilities for vehicular traffic. Such vehicular traffic has occasioned and is integrally related to health, energy, environmental, traffic, and transportation

crises within the State of New Jersey and the Port District generally.

2. Because of these crises, the Legislature of the State of New Jersey concluded that The Port Authority must undertake larger responsibilities for alternative modes of transportation, to assure balanced transportation within the Port District. That legislative determination was both reasonable and in no way prohibited by the 1962 Covenant which purported to limit Port Authority activity as to passenger railroads only.

3. In light of the aforesaid legislative judgment, and the paramount importance of transportation to the health, economic vitality and environment of the citizens of the State, it was reasonable for the Legislature further to determine, as it did in adopting the 1974 Act, that the decision as to what transportation systems and combinations thereof are best suited to relieve the crises referred to in paragraph 1 ought not be prejudiced by the preclusion of further Port Authority financing for passenger railroad systems.

SEVENTH SEPARATE DEFENSE

1. The 1962 Covenant was enacted as part of substantially identical New Jersey and New York statutes entitled "An Act to provide for the financing and effectuation by the Port of New York Authority of a port development project, consisting of the Hudson tubes, the Hudson ' bes extensions and a world trade center, for co-ordinating, facilitating and promoting the transportation of persons and the flow and exchange of trade and commerce in and through the Port of New York District, and agreeing with the State of New York with respect thereto."

2. Pursuant to the 1962 legislation, The Port Authority assumed for the first time a significant role in the operation of a passenger railroad facility (now the PATH system) and embarked upon the development, construction and operation of the World Trade Center.

3. Since the adoption of the 1962 legislation, including the Covenant contained therein, The Port Authority has accumulated considerable experience in the operation of a passenger railroad facility, construction of the World Trade Center (at a total projected cost of about $850,000,000) has been substantially completed and The Port Authority has completed many other projects, including substantial redevelopment projects at the Authority's three major airports. These developments have materially increased the assets, reserves and revenues of The Port Authority from what they were in 1962.

4. Since 1962, New Jersey and New York generally, and the Port District in particular, have experienced severe health, energy, environmental, traffic and transportation crises resulting from excessive use of motor vehicles that were not foreseen when the 1962 legislation, referred to in paragraph 1, was enacted. These crises were particularly acute in the latter part of 1973 and the first quarter of 1974 —immediately prior to the adoption of the 1974 Act—as a result of the extreme shortage of motor gasoline, which seriously impaired the physical and economic stability of the Port District.

5. By reason of the changed conditions since 1962 referred to in paragraphs 3 and 4, the Legislature of the State of New Jersey could reasonably have concluded that the continued prohibition, embodied in subparagraph (b) of the 1962 Covenant, of further participation by the Port Authority in passenger railroad facilities and operations

had become contrary to the public policy of this State and that this part of the 1962 Covenant should be repealed, as it was by the 1974 Act.

WHEREFORE, defendants demand judgment dismissing the complaint.

COUNTERCLAIM

Defendant The State of New Jersey, counterclaiming against plaintiff and the class of Port Authority bondholders represented by it, says:

1. This is a counterclaim for a declaratory judgment that Chapter 25 of the Laws of New Jersey 1974 (the 1974 Act challenged herein by plaintiff) and the substantially identical Chapter 993 of the Laws of New York 1974 are in all respects valid and constitutional.

2. This counterclaim is brought as a class action against plaintiff and the class or classes represented by it, consisting "of all of the holders of Consolidated Bonds of The Port Authority who have an undivided interest in the revenues of The Port Authority and the reserve funds securing such Consolidated Bonds." Class action treatment of this counterclaim is appropriate for the reasons alleged in paragraphs 8 through 14 of the complaint and the answer thereto, which are incorporated herein by reference.

3. Defendant repeats and realleges, as if set forth herein at length, each of the allegations of the Second through the Seventh Separate Defenses of the answer.

4. The statutes referred to in paragraph 1 of this counterclaim do not impair the obligation of any contract with or take the property of plaintiff or the class or classes

represented by it and do not otherwise violate any provision of the Constitutions of the United States, New Jersey or New York.

WHEREFORE, the State of New Jersey demands:

(a) A declaratory judgment that Chapter 25 of the Laws of New Jersey 1974 and Chapter 993 of the Laws of New York 1974 are in all respects valid and constitutional; and

(b) Such other and further relief as the Court may deem just and proper.

WILLIAM F. HYLAND
Attorney General of the
State of New Jersey
Attorney for Defendants

By: Michael I. Sovern
Murray J. Laulicht
Harold Edgar
Special Counsel for
Defendants

Dated: July 15, 1974

[Certificate of service omitted in printing]

Answer to Counterclaim

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—BERGEN COUNTY

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series; on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Plaintiff,

vs.

THE STATE OF NEW JERSEY; BRENDAN T. BYRNE, Governor of the State of New Jersey; and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Defendants.

Plaintiff, United States Trust Company of New York, by way of Answer to the Counterclaim of defendant, The State of New Jersey, says:

1. Plaintiff denies that Chapter 25 of the Laws of New Jersey 1974 is valid and constitutional. Plaintiff further denies that this Court has jurisdiction to determine the validity of Chapter 993 of the Laws of New York 1974.

2. Plaintiff admits that it represents a class consisting "of all of the holders of Consolidated Bonds of The Port Authority who have an undivided interest in the revenues of The Port Authority and the reserve funds securing such Consolidated Bonds" and that class action treatment of this counterclaim is appropriate.

Answer to Counterclaim

3. As to the allegations of the Second through Seventh Separate Defenses repeated and realleged by defendant The State of New Jersey in Paragraph 3 of its Counterclaim plaintiff says:

AS TO THE SECOND SEPARATE DEFENSE

1. Plaintiff denies the allegations contained therein.

AS TO THE THIRD SEPARATE DEFENSE

1. Plaintiff admits that Congress consented to the Port Authority Compact and Comprehensive Plan pursuant to the Compact Clause of the Constitution of the United States. Plaintiff denies that Congressional consent was required or given pursuant to the Interstate Commerce Clause of the Constitution of the United States.

2. Plaintiff admits that the Preamble to the Compact contains the provision as set forth by the defendant but refers to the entire Preamble and the entire Compact for their full terms and legal effect.

3. Plaintiff denies the allegations contained in Paragraph 3 of the Third Separate Defense.

4. Plaintiff denies the allegations contained in Paragraph 4 of the Third Separate Defense.

AS TO THE FOURTH SEPARATE DEFENSE

1. Plaintiff denies the allegations contained in Paragraph 1 of the Fourth Separate Defense but admits that the 1974 Act repealed only Subparagraph b of the 1962 Covenant.

2. Plaintiff denies the allegations contained in Paragraph 2 of the Fourth Separate Defense.

3. Plaintiff admits the allegations contained in Paragraph 3 of the Fourth Separate Defense and refers to the 1974 Act for its terms and legal effect.

4. Plaintiff admits the allegations contained in Paragraph 4 of the Fourth Separate Defense and refers to the 1974 Act for its terms and legal effect.

5. Plaintiff denies the allegations contained in Paragraph 5 of the Fourth Separate Defense.

As To The Fifth Separate Defense

1. Plaintiff refers to the bonds issued by the Port Authority, the Official Statements published by the Port Authority, the Compact and the various statutes of New Jersey and New York amendatory thereof and supplemental thereto for their terms and legal effect.

2. Plaintiff admits that Article VII of the Port Authority Compact contains the provision as set forth by the defendant but refers to the entire Compact and amendatory and supplemental legislation for their full terms and legal effect.

3. Plaintiff denies the allegations contained in Paragraph 3 of the Fifth Separate Defense.

4. Plaintiff denies the allegations contained in Paragraph 4 of the Fifth Separate Defense.

As To The Sixth Separate Defense

1. With respect to the first sentence of Paragraph 1 of the Sixth Separate Defense, plaintiff refers to the Compact for its full terms and legal effect. Plaintiff denies the allegations contained in the second sentence of Paragraph 1 of the Sixth Separate Defense. Plaintiff denies knowledge

or information sufficient to form a belief with respect to the allegations contained in the third sentence of Paragraph 1 of the Sixth Separate Defense.

2. Plaintiff denies the allegations contained in Paragraph 2 of the Sixth Separate Defense.

3. Plaintiff denies the allegations contained in Paragraph 3 of the Sixth Separate Defense.

As To The Seventh Separate Defense

1. Plaintiff admits the allegations contained in Paragraph 1 of the Seventh Separate Defense and refers to the said statutes for their terms and legal effect.

2. Plaintiff admits that the 1962 legislation permitted the Port Authority to embark upon the development, construction and operation of the World Trade Center and to assume a significant role in the operation of a passenger railroad facility (now the PATH system) but denies knowledge or information sufficient to form a belief as to whether this legislation was the first time that the Port Authority assumed a significant role in the operation of a passenger railroad facility.

3. Plaintiff denies knowledge or information sufficient to form a belief with respect to the allegations contained in Paragraph 3 of the Seventh Separate Defense.

4. Plaintiff denies knowledge or information sufficient to form a belief with respect to the allegations contained in Paragraph 4 of the Seventh Separate Defense.

5. Plaintiff denies the allegations contained in Paragraph 5 of the Seventh Separate Defense.

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4. Plaintiff denies the allegations contained in Paragraph 4 of the Counterclaim.

Answer to Counterclaim

AFFIRMATIVE DEFENSES TO COUNTERCLAIM

First Affirmative Defense

The State of New Jersey is estopped from challenging the validity of the 1962 Covenant since during the twelve years subsequent to the enactment of this legislation over one billion dollars of Port Authority obligations were issued by the Port Authority pursuant to the provisions of the 1962 Covenant and were purchased by plaintiff and the class it represents based upon the Covenant.

Second Affirmative Defense

The State of New Jersey is barred from attacking the validity of the 1962 Covenant based upon laches due to its failure to assert its claim for twelve years.

Third Affirmative Defense

The State of New Jersey is barred from attacking the validity of the 1962 Covenant based upon waiver.

Meyner, Landis & Verdon
Attorneys for Plaintiff

Robert B. Meyner
Robert B. Meyner

Of Counsel:

Carter, Ledyard & Milburn, Esqs.
2 Wall Street
New York, New York 10005

[Certificate of Service omitted in printing.]

Consent Order

SUPERIOR COURT OF NEW JERSEY

Law Division—Bergen County

United States Trust Company of New York, as Trustee for the Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series; on its own behalf and on behalf of all holders of Consolidated Bonds of the Port Authority of New York and New Jersey and all others similarly situated,

Plaintiff,

vs.

The State of New Jersey: Brendan T. Byrne, Governor of the State of New Jersey; and William F. Hyland, Attorney General of the State of New Jersey,

Defendants.

This matter being opened to the Court by Meyner, Landis & Verdon, attorneys for the United States Trust Company of New York (Trust Company); and the Court having considered the Affidavits of J. Sinclair Armstrong and Edwin C. Landis, Jr.; and it appearing to the Court that the Trust Company, Trustee for the 40th and 41st Series of Consolidated Bonds of the Port Authority of New York and New Jersey (Port Authority), is also the holder of a signficant amount of all Series of Consolidated Bonds of the Port Authority; and it further appearing to the Court that the Trust Company presents claims and defenses which are typical of the class of holders of Consolidated Bonds of the Port Authority and that the Trust Company and its counsel are fully competent to fairly and adequately protect the

interests of the class; and the Court having reviewed the provisions of R. 4:32-3(b) and other due process considerations; and the Court having noted the widespread publicity given to this action and the absence of intervening bondholders; and it appearing that all parties have consented to this order, it is

ORDERED that this action shall be maintained and defended as a class action under Rule 4:32-1(b)(1) and (b)(2) by the Trust Company as representative on behalf of a class consisting of all holders of all Series of Consolidated Bonds of the Port Authority; and it is

FURTHER ORDERED that notice of this class action be deemed to have been given to members of the class of bondholders via the media publicity given to this class action.

GEORGE B. GELMAN,
J.S.C.

Dated: October 24, 1974

The within Order is hereby consented to as to form and substance.

MEYNER, LANDIS & VERDON
Gateway I—Suite 2500
Newark, New Jersey 07102

By: ROBERT B. MEYNER

CARTER, LEDYARD & MILBURN
Two Wall Street
New York, New York 10005

By: DEVEREUX MILBURN
Attorneys for plaintiff,
U. S. Trust Company

WILLIAM F. HYLAND
Attorney General of the
State of New Jersey

By: MICHAEL L. SOVERN

By: MURRAY J. LAULICHT

By: HAROLD EDGAR

Attorneys for defendants,
State of New Jersey,
Brendan T. Byrne, and
William F. Hyland

Affidavit of Edwin C. Landis, Jr.
Sworn to October 23, 1974

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—BERGEN COUNTY

[TITLE OMITTED IN PRINTING]

STATE OF NEW JERSEY
COUNTY OF ESSEX } ss.:

EDWIN C. LANDIS, JR., of full age, being duly sworn according to law, upon his oath, deposes and says:

1. Many newspaper and other periodical reports and comments regarding this lawsuit have been published since the complaint was filed on April 30, 1974. I have assembled those listed below and attach them as indicated.

a. "For Mass Transit"—New York Post, New York City, New York, April 30, 1974

b-1. "Bondholders Counter Byrne Transit Bid"—Post, Paramus, New Jersey, May 1, 1974

b-2. "Byrne signs bill lifting PA bonding restriction"—The Record, Hackensack, New Jersey, May 1, 1974

b-3. "Byrne signs PA transit-$ pact in Jersey; NYC bank files suit to block move"—Long Island Press, Jamaica, New York City, New York, May 1, 1974

b-4. "Byrne signs Port legislation"—The News Tribune, Woodbridge, New Jersey, May 1, 1974

b-5. "Byrne Signs Transit Legislation"—Paterson News, Paterson, New Jersey, May 1, 1974

b-6. "Covenant repealer now law"—The Herald-News, Passaic, New Jersey, May 1, 1974

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b-7. "Jersey Sued Over Agreement"—Paterson News, Paterson, New Jersey, May 1, 1974

b-8. "Law Dismays Municipal-Bond Dealers"—New York Times, New York City, New York, May 1, 1974

b-9. "New York Bank challenges P.A. move"—The Star Ledger, Newark, New Jersey, May 1, 1974

b-10. "N.Y. transit action awaited by Byrne"—Burlington County Times, Willingboro, New Jersey, May 1, 1974

b-11. "PA Mass Transit Bill Becomes Law"—The Daily Register, Red Bank—Middletown, New Jersey, May 1, 1974

b-12. "Port Panel Backs Move On Transit"—New York Times, New York City, New York, May 1, 1974

b-13. "Suit attacks Port Authority legislation"—The Jersey Journal, Jersey City, New Jersey, May 1, 1974

b-14. "Suit Is Filed Over Use Of Port AuthorityFunds"—The Wall Street Journal, New York City, New York, May 1, 1974

b-15. "US Trust Seeks to Void NJ Threat to Bonds"—American Banker, New York City, New York, May 1, 1974

c-1. "Albany Votes Bill to Free Port Unit for Mass Transit"—New York Times, New York City, New York, May 2, 1974

c-2. "Clearing the Tracks"—Asbury Park Evening Press, Asbury Park, New Jersey, May 2, 1974

c-3. "Hunterdon Legislators Support PA Repealer"—Hunderdon County Democrat, Flemington, New Jersey, May 2, 1974

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c-4. "The Predicted Consequences"—Daily News, New York City, New York, May 2, 1974

c-5. "The state welshes"—The Herald-News, Passaic, New Jersey, May 2, 1974

c-6. "Wilson Gets Bill to Have PA Pay for Mass Transit"—Daily News, New York City, New York May 2, 1974

d. "Transit turnabout"—The Citizen Register, Ossining, New York, May 3, 1974

e. "Port Authority's Future: Will It Be In Mass Transit?"—New York Times, New York City, New York, May 5, 1974

f-1. "Dishonest, too"—The Herald-News, Passaic, New Jersey, May 6, 1974

f-2. "PA on the Right Track"—The Dispatch, Union City, New Jersey, May 6, 1974

f-3. "Word and Bond"—Barron's National Business and Financial Weekly, New York City, New York, May 6, 1974

g-1. "Set Pretrial Session In PA Transit"—The Dispatch, Union City, New Jersey, May 7, 1974

g-2. "Suit Aims to Kill PATH Law"—Paterson News, Paterson, New Jersey, May 7, 1974

h. "PATH Hearing In July"—Paterson News, Paterson, New Jersey, May 8, 1974

i. "The Editor's Corner"—The Daily Bond Buyer, New York City, New York, May 13, 1974

j. "Keeping Faith With Investors"—The Journal of Commerce, New York City, New York, May 15, 1974

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k. "Municipal Forum Fights Repeal of PA Covenant"—American Banker, New York City, New York, May 8, 1974

l. "Wilson Is Urged To Sign Repeal of PA Bond Covenant"—The Daily Bond Buyer, New York City, New York, May 29, 1974

m. "Club opposes auto tax . . . and joins N. J. AAA in toll rate protest"—New York Motorist, New York City, New York, May 1974

n. "Freeing the P.A."—New York Times, New York City, New York, June 1, 1974

o. "P.A. rule hinges on Wilson"—Sunday Star Ledger, Newark, New Jersey, June 2, 1974

p. "GREEN LIGHT: Wilson signs bill putting P.A. on mass transit track"—Sunday Star Ledger, Newark, New Jersey, June 16, 1974

q-1. "Bank's N.Y. Suit Would Bar P.A. Aid for Mass Transit"—Paterson News, Paterson, New Jersey, June 17, 1974

q-2. "Looks Like Big Wait for Transit Aid From PA"—Daily News, New York City, New York, June 17, 1974

q-3. "N.Y. bank is filing suit as Wilson frees PA funds"—The Record, Hackensack, New Jersey, June 17, 1974

q-4. "New York Governor Signs Port Authority Mass-Transit Measure"—The Wall Street Journal, New York City, New York, June 17, 1974

q-5. "Plans Suit to Upset Transit Role by PA"—The Dispatch, Union City, New Jersey, June 17, 1974

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q-6. "PA TRANSIT LAW FACES 2d SUIT, Big Bondholders to Sue On PA Transit Action"—Daily News, New York City, New York, June 17, 1974

q-7. "Sue To Halt PA Shift"—The Daily Journal, Elizabeth, New Jersey, June 17, 1974

q-8. "Wilson, Dubious of Effect, Signs Port-Bond Measure"—New York Times, New York City, New York, June 17, 1974

r-1. "VIEWPOINT—Grudging Approval"—The Star Ledger, Newark, New Jersey, June 18, 1974

r-2. "PA Mulls Assistance For Transit"—The Dispatch, Union City, New Jersey, June 18, 1974

r-3. "Suit filed to keep P.A out of transit"—Staten Island Advance, Staten Island, New York, June 18, 1974

r-4. "U.S. Trust Files Suit Over Port Authority's Mass-Transit Funding"—The Wall Street Journal, New York City, New York, June 18, 1974

r-5. "U.S. Trust Sues to Void N.Y. Repeal of PA Covenant; Wilson Concedes Law Overturns State's Pledge"—The Daily Bond Buyer, New York City, New York, June 18, 1974

s. "Closer and closer"—The News Tribune, Woodbridge, New Jersey, June 19, 1974

t-1. "Hearing scheduled for P.A. July 25 on mass transit"—The Jersey Journal, Jersey City, New Jersey, June 20, 1974

t-2. "Opposing Sides on PA Covenant Will Debate July 25 in N.J. Court"—The Daily Bond Buyer, New York City, New York, June 20, 1974

Affidavit of Edwin C. Landis, Jr.
Sworn to October 23, 1974

u. "Suits to test PA transit covenant"—The Herald-News, Passaic, New Jersey, June 26, 1974

v. "N.J. Judge Revises Dates For Arguments and Briefs on 2 PA Covenant Suits"—The Daily Bond Buyer, New York City, New York, June 28, 1974

w. "Columbia dean to argue P.A. bond suit"—Sunday Star Ledger, Newark, New Jersey, June 30, 1974

x. "Hyland Calls for Help"—The Dispatch, Union City, New Jersey, July 1, 1974

y-1. "N.J. answers suit, defends repeal of PA bond covenant"—The Herald-News, Passaic, New Jersey, July 16, 1974

y-2. "PA covenant repeal defended"—The Daily Register, Shrewsbury, New Jersey, July 16, 1974

y-3. "PA Says Bond Move Legitimate"—Asbury Park Evening Press, Asbury Park, New Jersey, July 16, 1974

y-4. "State answers suit on P.A. pact repealer"—Star Ledger, Newark, New Jersey, July 16, 1974

y-5. "State Argues For Repeal Of PA Ban"—Paterson News, Paterson, New Jersey, July 16, 1974

z. "PA contradicts commitment to mass transit"—The Record, Hackensack, New Jersey, July 17, 1974

aa. "Pesin to Byrne: Act on P.A. in transit"—The Jersey Journal, Jersey City, New Jersey, July 18, 1974

bb. "Standard operating procedure"—The Sunday Record, Hackensack, New Jersey, July 21, 1974

cc. "Port Authority Defends Legal Fees for Trustee"—The Daily Bond Buyer, New York City, New York, July 22, 1974

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2. The ABC circulation figure cited for each following newspaper is the figure from the Audit Bureau Circulation Report of September 30, 1973.

3. The Asbury Park Evening Press is a newspaper published daily in Asbury Park, New Jersey, and has an ABC circulation list of 89,764 Monday through Saturday and 110,173 for Sunday. It is distributed throughout Monmouth and Ocean Counties.

4. Barron's National Business and Financial Weekly is a newspaper published weekly in New York City, New York, and has an ABC circulation list of 221,321. It is distributed nationally.

5. The Burlington County Times is a local newspaper published daily in Willingboro, New Jersey, and has an ABC circulation list of 37,132 Monday through Saturday and 24,807 for Sunday.

6. The Citizen Register is a local newspaper published Monday through Saturday in Ossining, New York, and has an ABC circulation list of 9,068. It is distributed only in Ossining and several small surrounding towns.

7. The Daily Bond Buyer is a newspaper published Monday through Friday, in New York City, New York. It is distributed nationally throughout the community of purchasers and sellers of bonds.

8. The Daily Journal is a newspaper published Monday through Saturday in Elizabeth, New Jersey, and has an ABC circulation list of 66,063 Monday through Friday and 60,540 for Saturday. It is distributed throughout three New Jersey counties: Essex, Middlesex, and Union.

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9. The Daily News is a newspaper published daily in New York City, New York, and has an ABC circulation list of 2,120,549 Monday through Saturday and 2,933,182 for Sunday. It is circulated throughout the Northeast region of the United States.

10. The Daily Register is a newspaper published Monday through Friday in Shrewsbury, New Jersey, and has an ABC circulation list of 31,202. It is distributed throughout northern Monmouth County.

11. The Hudson Dispatch is a local newspaper published Monday through Saturday in Union City, New Jersey, and has an ABC circulation list of 53,576.

12. The Herald-News is a newspaper published Monday through Saturday in Passaic, New Jersey, and has an ABC circulation list of 93,372 Monday through Friday and 93,338 for Saturday. It is distributed throughout the entire northern New Jersey area.

13. The Hunterdon County Democrat is a newspaper published weekly in Flemington, New Jersey, and has an ABC circulation list of 19,160.

14. The Jersey Journal is a newspaper published Monday through Saturday in Jersey City, New Jersey, and has an ABC circulation list of 86,368 Monday through Friday and 81,382 for Saturday. It is distributed throughout Hudson County, New Jersey.

15. The Journal of Commerce is a financial newspaper published Monday through Friday in New York City, New York, and has an ABC circulation list of 23,296. It is distributed nationally.

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16. The Long Island Press is a newspaper published daily in Jamaica, New York City, New York, and has an ABC circulation list of 355,046 Monday through Saturday and 335,127 for Sunday. It is distributed throughout the Long Island area.

17. The New York Motorist is a newspaper published by the Automobile Club of New York in New York City, New York. It is published monthly and distributed throughout the more than 416,500 members of the AAA club of New York for the fourteen southern-most counties.

18. The New York Post is a newspaper published daily excluding Sunday and has an ABC circulation list of 626,713 Monday through Friday and 375,607 for Saturday. It is distributed nationally.

19. The New York Times is a newspaper published daily in New York City, New York, and has an ABC circulation list of 4,505,949. It has wide national and international distribution.

20. The News Tribune is a newspaper published Monday through Saturday in Woodbridge, New Jersey, and has an ABC circulation list of 54,153. It is distributed throughout Middlesex and Monmouth Counties.

21. The Paterson News is a local newspaper published Monday through Saturday in Paterson, New Jersey. It has an ABC circulation list of 29,581 Monday through Friday daily, 44,638 Monday through Friday evening, and 69,627 for Saturday. It is distributed in the Paterson area of Passaic County.

22. The Post is a local newspaper published on Sunday and Wednesday in Paramus, New Jersey, and has an ABC

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circulation list of 9,572 for Sunday and 28,009 for Wednesday. It is distributed throughout North Bergen County.

23. The Record is a newspaper published daily, excluding Saturday, in Hackensack, New Jersey, and has an ABC circulation list of 152,140 Monday through Friday and 181,995 for Sunday. It is distributed mainly throughout Bergen County, with some distribution in Passaic County, New Jersey, and Rockland County, New York.

24. The Star-Ledger is a newspaper published daily in Newark, New Jersey, and has an ABC circulation list of 356,306 Monday through Friday, 335,839 for Saturday, and 560,261 for Sunday. It is circulated throughout the entire New Jersey area.

25. The Staten Island Advance is a newspaper published daily in Staten Island, New York, and has an ABC circulation list of 68,690 Monday through Friday, 64,440 for Saturday, and 69,086 for Sunday. It is distributed principally in Staten Island.

26. The Wall Street Journal is a financial newspaper. Four editions of this newspaper are published daily, excluding Saturday and Sunday. The Eastern edition is published in White Oak, Maryland; South Brunswick, New Jersey, and Chicopee Falls, Massachusetts; and has an ABC circulation list of 515,824. The Midwest edition is published in Chicago and Hyland, Illinois, and Cleveland, Ohio, and has an ABC circulation list of 390,711. The Pacific Coast edition is published in Riverside and Palo Alto, California, and has an ABC circulation list of 223,417. The Southwest edition is published in Dallas, Texas, and has an ABC circulation list of 121,592. The articles noted above as appearing in the Wall Street Journal in fact

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appeared in each of the four editions except the June 18th article which did not appear in the Midwest edition.

27. I am advised by the Port Authority of New York and New Jersey that of the approximately $1,600 million in outstanding Consolidated Bonds of all series, approximately $76 million are held in registered form. I am further advised that the balance of approximately $1,524 million are held in bearer form by owners unknown to the Port Authority or its paying agents. I am further advised that the list of owners of registered bonds contains approximately 2800 names, some of which are duplications.

EDWIN C. LANDIS, JR.

(Sworn to October 23, 1974.)

[Jurat and attachments omitted in printing.]

Affidavit of J. Sinclair Armstrong
Sworn to October 24, 1974

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—BERGEN COUNTY

[Title omitted in printing]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

J. SINCLAIR ARMSTRONG, being duly sworn, deposes and says:

1. I am an Executive Vice President of UNITED STATES TRUST COMPANY OF NEW YORK, a New York corporation (the "Trust Company"), with its principal office at 45 Wall Street, New York, New York. I am fully familiar with the matters set forth in this affidavit.

2. The Trust Company instituted this action as the Trustee for The Port Authority Consolidated Bonds, Fortieth and Forty-First Series, pursuant to Section 8 of the Resolution Establishing the Fortieth Series of Consolidated Bonds, due 2008 adopted May 10, 1973 and the Resolution Establishing the Forty-First Series of Consolidated Bonds, due 2008 adopted September 13, 1973.

3. Pursuant to such Section 8 of the respective Resolutions adopted by The Port Authority the Trust Company is "authorized to act in its discretion to assure that all of the rights of and obligations to the holders of bonds of [such] Series are unconditionally recognized, protected and fulfilled." Such Resolutions also permit the Trust Company "to institute any action on behalf of the holders of bonds of [such] Series against [The Port Authority] or others which it shall in its sole discretion deem advisable . . ."

4. The Trust Company also brings this action on its own behalf as the holder (in its own account, as custodian and in its several fiduciary capacities) of approximately $96,780,000 principal amount (as of July 13, 1974) of the Consolidated Bonds of The Port Authority and on behalf of all of the holders of Consolidated Bonds of The Port Authority who have an undivided interest in the revenues of The Port Authority and the reserve funds securing such Consolidated Bonds.

5. As of July 13, 1974, approximately $1,600,000,000 principal amount of Consolidated Bonds of The Port Authority were outstanding and held by banks, trust companies, other financial institutions, pension funds and private individuals.

6. As of July 13, 1974 the Trust Company held (in its own account, as custodian and in its several fiduciary capacities) the following Consolidated Bonds issued by The Port Authority of New York and New Jersey in the following amounts:

Name of Bond Issue	Principal Amount
First Series Consolidated Bonds	$ 1,120,000
Second Series Consolidated Bonds	778,000
Fourth Series Consolidated Bonds	1,498,000
Fifth Series Consolidated Bonds	811,000
Sixth Series Consolidated Bonds	1,848,000
Seventh Series Consolidated Bonds	1,011,000
Eighth Series Consolidated Bonds	1,912,000
Ninth Series Consolidated Bonds	55,000
Tenth Series Consolidated Bonds	1,545,000
Eleventh Series Consolidated Bonds	896,000
Twelfth Series Consolidated Bonds	15,000
Thirteenth Series Consolidated Bonds	390,000

Name of Bond Issue	Principal Amount
Fourteenth Series Consolidated Bonds	$1,045,000
Fifteenth Series Consolidated Bonds	199,000
Sixteenth Series Consolidated Bonds	680,000
Seventeenth Series Consolidated Bonds	195,000
Eighteenth Series Consolidated Bonds	600,000
Nineteenth Series Consolidated Bonds	860,000
Twentieth Series Consolidated Bonds	1,071,000
Twenty-First Series Consolidated Bonds	933,000
Twenty-Second Series Consolidated Bonds	531,000
Twenty-Third Series Consolidated Bonds	1,231,000
Twenty-Fourth Series Consolidated Bonds	1,067,000
Twenty-Fifth Series Consolidated Bonds	682,000
Twenty-Sixth Series Consolidated Bonds	986,000
Twenty-Seventh Series Consolidated Bonds	925,000
Twenty-Eighth Series Consolidated Bonds	868,000
Twenty-Ninth Series Consolidated Bonds	242,000
Thirtieth Series Consolidated Bonds	1,201,000
Thirty-First Series Consolidated Bonds	5,005,000
Thirty-Second Series Consolidated Bonds	5,045,000
Thirty-Third Series Consolidated Bonds	6,150,000
Thirty-Fourth Series Consolidated Bonds	5,175,000
Thirty-Fifth Series Consolidated Bonds	9,685,000
Thirty-Sixth Series Consolidated Bonds	3,500,000
Thirty-Seventh Series Consolidated Bonds	6,380,000
Thirty-Eighth Series Consolidated Bonds	10,405,000
Thirty-Ninth Series Consolidated Bonds	11,410,000
Fortieth Series Consolidated Bonds	3,710,000
Forty-First Series Consolidated Bonds	5,120,000

7. Under Section 2 of each of the Agreements of Trust between the Port Authority and the Trust Company, the Port Authority is obligated to pay to the Trust Company

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Sworn to October 24, 1974

"reasonable compensation for extraordinary services and reimbursement for such reasonable expenses, charges, counsel fees and other disbursements previously incurred by the Trustee for which provision is made for payment in Section 8 of the Resolution and for which payment has not been made by the Authority". Section 8 of the Resolutions establishing Series 40 and Series 41 provides that, among other things, the Port Authority shall pay to the Trustee from time to time reasonable compensation for all services rendered and shall also pay to the Trustee all of its reasonable expenses, charges, counsel fees and other disbursements incurred in the performance of its powers and duties under the Resolution. One of the duties of the Trustee under the Resolution is to institute lawsuits on behalf of bondholders if it deems such lawsuits advisable in order to protect their interests.

Section 6-7 of the Model Debenture Indenture promulgated by the American Bar Foundation similarly provides for the payment to a trustee by an obligor of reasonable compensation for services rendered and the reimbursement of a trustee by an obligor for all reasonable expenses, including the compensation and expenses of its counsel. Accordingly, the payment of compensation to the Trust Company and the reimbursement of its expenses, including counsel fees, by the Port Authority in connection with the prosecution of the above-captioned lawsuit is in consonance with the usual and customary arrangement and practice between an obligor and trustee under a trust agreement. The Trust Company has initiated, prosecuted and will continue to prosecute this lawsuit independently of the Port Authority.

J. SINCLAIR ARMSTRONG

(Sworn to October 24, 1974.)

[Jurat omitted in printing.]

Decision of the Superior Court of New Jersey, Law Division, Bergen County

UNITED STATES TRUST COMPANY OF NEW YORK, ETC., PLAINTIFF, v. THE STATE OF NEW JERSEY, *ET AL.*, DEFENDANTS .

DANIEL M. GABY, PLAINTIFF, v. THE PORT OF NEW YORK AUTHORITY, *ET AL.*, DEFENDANTS.

Superior Court of New Jersey
Law Division

Argued April 8, 9, 1975—Decided May 14, 1975.

SYNOPSIS

Consolidated actions were brought concerning constitutional validity of legislation creating, and later repealing, a covenant between the States of New Jersey and New York and holders of bonds issued by the Port Authority of New York and New Jersey. Defendants filed counterclaim for declaration of validity of repealing legislation. The Superior Court, Law Division, Gelman, J. S. C., held that legislative enactments, such as the 1962 covenant whereby the States and Authority were precluded from applying Authority revenues and reserves for passenger railroad purposes unless permitted by criteria set forth in the covenant, can constitute a contract within meaning of the contract clauses of the State and Federal Constitutions, that not every impairment of a contract obligation or security for its performance runs afoul of the contract clause, that a State's inherent power to protect the public welfare may be validly exercised under the contract clause even if it impairs a contractual obligation so long as it does not destroy it, and that in view of emergent problems of air pollution, crises in mass transit and energy problems repeal legislation was a reasonable and valid exercise of the State's police power and was not prohibited by the contract clause of either the Federal or State Constitution.

Complaints dismissed; judgment for defendants on counterclaim.

Mr. Robert B. Meyner and Mr. Devereux Milburn (of the New York Bar) for plaintiff United States Trust Company (*Messrs. Meyner, Landis & Verdon,* attorneys; and *Messrs. Carter, Ledyard & Milburn,* attorneys; and *Mr. Donald J. Robinson* (of the New York Bar) *Messrs. Hawkins, Delafield & Wood,* attorneys).

Mr. Michael I. Sovern (of the New York Bar) and *Mr. Murray J. Laulicht,* special counsel for defendants (*Mr. William F. Hyland,* Attorney General of New Jersey, attorney; *Mr. Harold S. H. Edgar* (of the New York Bar) on the brief).

Mr. Theodore W. Kheel (of the New York Bar) and *Mr. Howard Stern* for plaintiff Daniel M. Gaby (*Messrs. Battle, Fowler, Stokes & Kheel,* attorneys, and *Messrs. Shavick, Stern, Schotz, Steiger & Croland,* attorneys).

Mr. Joseph Lesser (of the New York Bar) for defendant Port Authority of New York and New Jersey (*Mr. Francis A. Mulhern,* attorney); and *Mr. Patrick J. Falvey* (of the New York Bar), *Ms. Isobel E. Muirhead, Mr. Arthur P. Berg* (of the New York Bar), (*Mr. Vigdor D. Bernstein,* of counsel).

GELMAN, J. S. C. These are consolidated actions which have as their common subject matter the constitutional validity of legislation of this State creating, and later repealing, a covenant between the States of New Jersey and New York and the holders of bonds issued by the Port Authority of New York and New Jersey (Port Authority).[1] The

[1]Under the terms of the Compact of 1921 creating the Port Authority, *N. J. S. A.* 32:1-1 *et seq.*, legislative action taken by one state

first legislative act in question, *chapter* 8 of the *Laws of* 1962, *N. J. S. A.* 32:1–35.50 (the 1962 covenant), authorized the Port Authority to construct the World Trade Center and to acquire and operate the Hudson & Manhattan Railroad Company. As part of the 1962 legislation the two States enacted a statutory covenant with each other and with the holders of certain Port Authority bonds whereby the States and the Port Authority were precluded from applying the Authority's revenues and reserves for passenger railroad purposes unless permitted by the criteria set forth in the statute. *N. J. S. A.* 32:1–35.55.

The 1962 covenant was repealed by chapter 25 of the *Laws of* 1974.[2] The complaint filed by the United States Trust Company challenges the constitutionality of the repeal act of 1974, and the Gaby complaint attacks the validity of the 1962 covenant. We turn, then, to the procedural history of these actions and the issues projected by the respective pleadings.

Procedural History

1. *The Gaby Action*

On May 16, 1972 plaintiff Daniel Gaby filed a class action complaint for a declaratory judgment that the 1962 covenant violated the Federal and State Constitutions. The complaint named as defendants the Port Authority, its commissioners and executive director, and the then Governor of New Jersey, William T. Cahill. On October 25, 1972, on

affecting the powers and duties of the Port Authority is not effective until concurred in by the legislature of the other. *N. J. S. A.* 32:1–8. Statutory citations in this opinion will be limited to the applicable New Jersey statutes unless the context otherwise requires.

[2]In 1972 the Legislature had repealed the 1962 covenant as to all bonds of the Authority issued after the effective date of the act. *L.* 1972, *c.* 208; *N. J. S. A.* 32:1–35.55a. The act became effective upon the adoption of concurrent legislation by the State of New York on May 10, 1973. *Laws of N. Y.* 1973, *c.* 318. The validity of this legislation is not in issue in these proceedings.

the motion of the Attorney General of New Jersey, the complaint was dismissed as to former Governor Cahill. The Attorney General also moved to dismiss the complaint for failure to name as an indispensable party the Port Authority's bondholders. No disposition appears to have been made of the motion at that time.

The Gaby complaint alleges, among other things, that the residents of the State of New Jersey are dependent upon mass transit facilities and are adversely affected by the deterioration of such facilities within the District serviced by the Port Authority (the Port District). It is alleged that the Port Authority was created by the Compact of 1921 and consented to by the United States Congress[3] to assure "cooperation of the two states in the future development" of transportation facilities within the Port District, and that by virtue of the 1962 covenant, restricting the Port Authority's power to acquire or operate passenger rail transit facilities, the two states entered into a new "Compact" without the consent of Congress and in violation of *U. S. Const.*, Art. 1, § 10. The complaint further alleges that the 1962 covenant constitutes an unconstitutional surrender by the State of its sovereign powers "to protect the health, general welfare and safety of the people," and that it has impaired and obstructed existing facilities for the transportation of goods in interstate commerce, in violation of *U. S. Const.*, Art. 1, § 8.

Gaby asks for multifarious relief. Aside from seeking a declaration as to the unconstitutionality of the 1962 covenant, he asks the court to declare the covenant to be subject to repeal, and to direct the Port Authority to formulate and submit to the court a plan for the development of mass transit facilities within the Port District.

The Gaby action was pretried on February 22, 1973, at which time it was stipulated that the action could proceed

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[3] *Pub. Res. No.* 17, 67th Cong., 1st Sess. (42 *Stat.* 174).

as a class action without formal notice to the class represented by plaintiff. Thereafter both sides moved for summary judgment, and oral argument on the motions was heard on September 26, 1973. At the conclusion of the argument the court directed the parties to submit further briefs on the constitutional issues and on the question whether the bondholders were necessary parties to the Gaby action. Following conferences between counsel and the court, it was agreed the United States Trust Company should be permitted to intervene in the Gaby action as a party defendant to represent the interests of the bondholders in that action. An order to such effect was entered on December 18, 1973, and arguments were rescheduled on the motions for summary judgment.

Prior to the date fixed for the argument the prospects for the adoption of the repeal act became apparent, and further action in the Gaby case was stayed pending future legislative developments.

2. *The United States Trust Company Action*

The New Jersey Legislature completed action on the repeal act on April 22, 1974, and Governor Brendan T. Byrne signed the bill into law on April 30, 1974. On the same day United States Trust Company (U. S. Trust) filed its complaint on behalf of itself as the holder of Port Authority bonds, as trustee for certain designated issues of Port Authority bonds, and on behalf of all holders of consolidated bonds issued by the Port Authority. The complaint names as defendants the State of New Jersey, Governor Byrne and the Attorney General of New Jersey, and seeks a declaratory judgment that the repeal act violated the Federal and State Constitutions.

U. S. Trust alleges that it is the holder (for its own account and in a fiduciary capacity) of $96,000,000 of consolidated bonds issued by the Port Authority; that the Port Authority was intended, under the terms of the Compact approved by Congress, to be a self-supporting public

agency whose obligations were to be and are payable from its net revenues and certain reserve funds; that the 1962 covenant was enacted to protect the Port Authority's existing and future bondholders from the diversion of pledged revenues and reserves to finance deficit mass transit facilities and further to preserve the Port Authority's credit standing; that the Port Authority notified prospective purchasers of its bonds of the existence of the 1962 covenant and purchasers relied on the covenant in purchasing bonds issued by the Port Authority, and that the secondary market for the Port Authority consolidated bonds has been adversely affected by the repeal act.

The complaint alleges that the repeal act violates the "impairment" and "taking" provisions of the Federal Constitution, *U. S. Const.*, Art. I, § 10 and Amends. V and XIV, and the equivalent provisions of the New Jersey Constitution, *N. J. Const.* (1947), Art. IV, § VII, par. 3; Art. I, pars. 1 and 20.

The answer filed by defendants asserts several defenses among which the following may be briefly noted: (1) the repeal act constitutes a reasonable exercise of the police power by the State; (2) the 1962 covenant itself violated the Federal Constitution because of lack of congressional consent; (3) the repeal act does not constitute an "impairment" of the contract since the obligation of the Port Authority to pay its bondholders remains intact; (4) the bondholders were on notice of the reserved powers of the State to repeal the 1962 covenant, and (5) the repeal act was adopted as a police power measure to meet a transportation crisis affecting the health, safety and welfare of persons residing within the District. Finally, the answer asserts a counterclaim for a declaratory judgment that the repeal act is constitutional.

A consent order was entered pursuant to *R.* 4:32-1 in the U. S. Trust action directing that the action be maintained and defended as a class action by U. S. Trust on

behalf of all holders of consolidated bonds of the Port Authority, and that notice to the class be deemed to have been given by means of the media publicity which was disseminated when the action was instituted. On December 10, 1974 the Gaby and U. S. Trust actions were consolidated by order of the court.

The parties to the U. S. Trust action have filed a 366-page stipulation of facts, accompanied by exhibits covering all phases of the case with the exception of two issues: (1) whether the purchasers of consolidated bonds issued by the Port Authority after the adoption of the 1962 covenant relied in fact upon the existence of the covenant, and (2) whether the repeal of the 1962 covenant adversely affected the secondary market for Port Authority bonds. These issues were the subject of a trial on February 4, 5, 6, 7 and 11, 1975, and the court's findings on the issues will be set forth *infra*.

The Formation, Facilities and Financial Structure of the Port Authority.

1. *Formation and Facilities.*

In 1917 the States of New Jersey and New York established the New York, New Jersey Port and Harbor Development Commission (the Commission) to study the facilities and problems of the Port of New York and to recommend a plan for the future development of the Port.[4] The Commission filed its *Report*[5] on December 16, 1920

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[4]The enabling legislation directed the commissioners to negotiate and agree upon a joint report recommending a policy for the states "to the end that said port shall be efficiently and constructively organized and furnished with modern methods of piers, rail and water and freight facilities * * *." The Commission was to work out "a comprehensive and adequate interstate and Federal port policy, to meet commercial needs in times of peace and the protection of the harbor and adjacent localities in times of war." *L.* 1917, *c.* 130.

[5]*Joint Report with Comprehensive Plan and Recommendations*, New York, New Jersey Port and Harbor Development Commission, 1920 (hereafter cited as the *Report*).

setting forth its findings, conclusions and recommendations. The core recommendation of the Commission was the creation by the two states of a common public agency by means of which the states would cooperate in the future development of the facilities of the Port in accordance with the comprehensive plan recommended by the Commission.[6] *Report* at 436. In discussing the legal precedents for the establishment by the States of an agency having a substantial impact on interstate commerce, the *report* stated:

> Permissive or restrictive, as the case may be, the power of Congress over the instrumentalities of interstate traffic is exclusive, when in a specific case it has been exercised. But this latter limitation, coupled with the broad police power of the State and its control of intrastate commerce, has left to New York and New Jersey a broad field within which they may act without express Federal consent. It is hoped, of course, by securing congressional approval of any plan which may be adopted, to avoid future conflict with the Federal authority over interstate unification and control of the Port. But for the present the States may act alone. [*Report* at 446]

Prophetically the Commission noted that

> [o]ur port problem is primarily a railroad problem. * * * Therefore the comprehensive plan to evolve which this Commission was created is essentially a railroad plan. With the proper network of rail facilities, the development of other terminal facilities can follow along rational lines * * *. A complete reorganization of the railroad system is the most fundamental physical need of the Port of New York. [*Report* at 3]

However, the railroad problem upon which the Commission focused was not that of passenger transit but the handling and distribution of freight and cargo into and out of the Port District, and the comprehensive plan recommended by the Commission addressed itself exclusively to the transportation and distribution, not of persons but of freight

[6]The recommendation for a Compact between the States was originally contained in the Commission's preliminary report submitted in 1918.

and cargo by rail, and to a lesser extent by ship and motor truck. In its 474 pages plus appendices the only significant discussion of passenger traffic in the *Report* is contained in the section dealing with ferries and vehicular tunnels. After noting that the bulk of interstate passenger traffic was accommodated by the Hudson River ferries and that the impact of the Holland Tunnel (started in 1920) could not be forecast, the *Report* opined:

> Vehicular tunnels offer little promise as a means of conveying passengers, and the one rapid-transit facility in existence between the two States, while operated to near capacity, is not sufficiently profitable to warrant optimism that others will be built. [*Report* at 330]

Following the submission of the Commission's *Report*, the Port of New York Authority[7] was created pursuant to an interstate compact, signed April 30, 1921, between the States of New Jersey and New York. *N. J. S. A.* 32:1–1 *et seq.* The consent of Congress "to each and every part and article" of the Port Authority Compact was obtained effective August 23, 1921. *Pub. Res. No.* 17, 67th Cong. 1st Sess. The preamble of the Port Authority Compact states that "a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey," and that "the future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money, and the cordial co-operation of the States of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans."

Article I of the Compact contains the agreement and pledge by the two states of their "faithful co-operation in

[7]The name of the Port of New York Authority was changed to the Port Authority of New York and New Jersey on July 1, 1972. *N. J. S. A.* 32:1–4.

the future planning and development of the port of New York, holding in high trust for the benefit of the nation the special blessings and natural advantages thereof". Article II defines the Port of New York District, comprising an area of about 1500 square miles in both states within a radius of about 25 miles from the Statue of Liberty. Article III establishes the Port Authority as "a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other, or by act or acts of congress." Article VI vests in the Port Authority "full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within [the Port] district"; to make charges for the use of such facilities, and "to borrow money and secure the same by bonds or by mortgages upon any property" held by the Port Authority. Article VII provides that the Port Authority "shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other," and mandates that the Port Authority shall not pledge the credit of either State except with the consent of its legislature. Article XI requires the Port Authority to make plans for the development of the Port District supplementary to or amendatory of any plan theretofore adopted, and Article XII authorizes the Port Authority to "make recommendations to the legislatures of the two states or to the congress of the United States, based upon study and analysis, for the better conduct of the commerce passing in and through the port of New York."

Article XXII of the Compact defines "transportation facility" to include "railroads, steam or electric * * * and every kind of transportation facility now in use or hereafter designed for use for the transportation or carriage of persons or property", and defines "railroad" as "includ[ing] railways, extensions thereof, tunnels, subways, bridges, elevated structures, tracks, poles, wires, conduits, power houses, substations, lines for the transmission of power, car barns, shops, yards, sidings, turnouts, switches, stations and approaches thereto, cars and motive equipment."

In 1922 the states, with the consent of Congress, adopted a Comprehensive Plan for the development of the Port of New York. *N. J. S. A.* 32:1–25 *et seq.; Pub. Res. No.* 66, 67th Cong., 2d Sess. The Comprehensive Plan sets forth the development program initially envisioned by the Commission for implementation by the Port Authority.

In the Plan, like the *Report* upon which it was based, unification of terminal operations and facilities, consolidation of shipments, adaptation and coordination of existing facilities, improvement of commercial rail, truck and water facilities and other freight handling improvements are set forth as principles to govern the development of the Port Authority. The Comprehensive Plan proposed to establish direct rail freight connections between New Jersey and Manhattan to furnish "the most expeditious, economical and practical transportation of freight especially meat, produce, milk and other commodities comprising the daily needs of the people." *N. J. S. A.* 32:1–29. Section 8 of the 1922 Comprehensive Plan statute denies to the Authority the power to levy taxes or assessments, and provides that the bonds or other securities issued by the Port Authority shall at all times be free from taxation by either state. *N. J. S. A.* 32:1–33. Finally, it should be noted that the power was reserved to the states to add to, modify or change any part of the Plan. *N. J. S. A.* 32:1–26.

Pursuant to the Compact, the Comprehensive Plan and subsequent amendments and supplements thereto, the Port Authority operates all of the interstate vehicular tunnels and bridges in the Port District, which include the Holland

Tunnel[8], the Lincoln Tunnel, the George Washington Bridge, the Bayonne Bridge and the Arthur Kill Bridges. In addition, the Port Authority owns and/or operates the following facilities: Newark International Airport, Teterboro Airport, LaGuardia Airport, John F. Kennedy International Airport and two heliports; Port Newark, the Hoboken Port Authority Marine Terminal, the Elizabeth Port Authority Marine Terminal, the Columbia Street Marine Terminal, the Erie Basin Port Authority Marine Terminal and a Mid-Manhattan Consolidated Passenger Ship Terminal; the Port Authority Bus Terminal, the George Washington Bridge Bus Station and the Newark and New York Union Motor Truck Terminals; the Port Authority Trans-Hudson system (operated for the Port Authority through its wholly-owned subsidiary, the Port Authority Trans-Husdon Corporation) and the World Trade Center.

Excluding the 1921 Compact and the 1922 Comprehensive Plan, the Legislatures of New Jersey and New York have adopted 39 separately enacted, concurrent statutes authorizing the construction and financing of the foregoing facilities, the issuance of bonds and notes by the Authority, the regulation of suits against it, and the establishment of a general reserve fund for the payment of the Authority's obligations. None of these 39 statutes received specific Congressional consent.

2. *The Financial Structure of the Port Authority*

Under the terms of the Compact the power to levy taxes or to pledge the credit of either state was expressly withheld from the Authority. From its inception, with the exception of monies advanced as loans by the states, the Authority was

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[8]The Holland Tunnel had been constructed by state commissions pursuant to a compact between the states which received the consent of Congress. In 1930 the Holland Tunnel was transferred to the Port Authority in order to enable it to honor its obligations to bondholders in the face of deficits incurred in connection with the Arthur Kill, George Washington and Bayonne Bridges. *L.* 1930, *c.* 247.

required to finance its facilities solely with money borrowed from the public and to be repaid out of the revenues derived from its operations. By reason of these financial limitations two concepts initially emerged which have played an important role in the realization of the purposes for which the Authority was created: first, the specific projects undertaken by the Authority should be self-supporting, *i. e.*, the revenues of each should be sufficient to cover its operating expenses and debt service requirements; and second, since the Authority is a public agency over which its creditors have no direct control, the bondholders should be protected by covenants with the Authority and with the states which have ultimate control over its operations.

The first facilities constructed by the Authority were vehicular spans linking Staten Island and New Jersey — the Arthur Kill Bridges — which were opened to traffic in 1928. A third Staten Island-New Jersey crossing, the Bayonne Bridge, was placed in operation in 1931. In that same year the George Washington Bridge was opened to traffic. With respect to each of these facilities the Port Authority was authorized to and did issue bonds in separate series to pay for the cost of acquisition of lands and construction. The revenues and tolls from each facility were statutorily pledged as security for the repayment of the series bonds issued in conjunction with the specific facility involved. *N. J. S. A.* 32:1–39, 62, 86. The States of New Jersey and New York advanced additional moneys to pay for the costs of construction, and the funds so advanced were accorded a subordinated status to the funds raised by the Authority from the sale of its own bonds to the public. *N. J. S. A.* 32:1–60, 63, 81, 87. The statutory authorizations for each project and its funding were declared to be "a contract or agreement between the two states for the benefit of those lending money to the port authority." *N. J. S. A.* 32:1–65, 89.

The first bonds issued to the public by the Authority were "closed-end" bonds based on the estimated costs of each facility, and the Authority was prohibited from issuing more

bonds than the amount initially authorized for the project. See *Goldberg, A History of the Port of New York Authority Financial Structure* (1964), at 3 (hereafter cited as *Goldberg*). The gross revenues from each bridge were applied first to the payment of expenses of operation and maintenance of the bridge, then to the payment of debt service on its bonds, and the surplus, if any, was to be deposited in a separate reserve fund available only to the bondholders of that series. *Goldberg,* at 4.

As noted earlier, the initial facilities were not self-sustaining, and in 1930 the states transferred the control, operation and the revenues of the Holland Tunnel to the Port Authority to help place the Port Authority on a self-sustaining basis. *N. J. S. A.* 32:1–119. Simultaneously, the states enacted legislation, commonly called the General Reserve Fund Act, *N. J. S. A.* 32:1–142, and by the terms of that act the surplus revenues derived by the Authority from all facilities built with the proceeds of sale of its bonds are pooled so as to create a general reserve fund in an amount equal to 10% of the par value of all bonds issued by the Authority. The act pledges the general reserve fund as security for the payment of interest and principal on all bonds theretofore or thereafter issued by the Authority. Surplus moneys of the Authority in excess of the general reserve fund requirements may be used for any purpose authorized by the states.

The general reserve fund thus becomes available to bondholders to pay the debt service requirements of facilities which were not self-supporting. By this device the surplus revenues of the Holland Tunnel were used to pay the debt service requirements of the Arthur Kill and Bayonne Bridges and the George Washington Bridge. The general reserve fund was also envisioned as a security device to induce the public to invest in future facilities such as the then contemplated Lincoln Tunnel project. See *Goldberg,* at 7.

Following the enactment of the General Reserve Fund Act the Port Authority issued additional series of bonds to finance the construction of the Inland Terminal Building and to repay

the states for the amounts expended by them to construct the Holland Tunnel. *Goldberg,* at 5. In 1935 the Authority commenced the issuance of a new series of bonds, known as general and refunding bonds, the proceeds of which were used to refund all of the original bridge bonds issued by the Authority and to finance the initial construction of the Lincoln Tunnel. These bonds were secured by a pledge of the net revenues of all of the Authority's then existing facilities and by the general reserve fund. Under the terms of the resolution authorizing the issuance of general and refunding bonds the Authority also contracted to create a special reserve fund into which would be paid all net revenues in excess of those required to pay the operating expenses of the Authority's facilities, the debt service requirements for the general and refunding bonds, and to maintain the general reserve fund at its prescribed level. *Goldberg,* at 11. The authorizing resolution imposed limitations on the use of the special reserve fund for the benefit of the bondholders.

In 1947 the Authority commenced the issuance of air terminal and marine terminal bonds, the proceeds of which were used for the acquisition and construction of various airport and marine terminal facilities. These bonds were secured by a pledge of the revenues of the specific facilities financed thereby, as well as by a call upon the general reserve fund to the extent that revenues from the facilities were insufficient to pay operating expenses and debt service requirements. As in the case of the general and refunding bonds, the air and marine terminal bond resolutions provided for their own special reserve funds for the benefit of the bondholders of each of these series.

In 1952 the Commissioners of the Port Authority embarked upon a new scheme for future financing which abandoned the practice of earmarking specific facility revenues as security for its bonds. On October 9, 1952 the Authority adopted the Consolidated Bond Resolution (the CBR), authorizing the issuance of consolidated bonds to serve as the medium for financing its activities in furtherance of any purpose for

which the Authority is authorized to issue bonds secured by a pledge of the general reserve fund.[9] Consolidated bonds constitute general obligations of the Authority, and all such bonds are equally and ratably secured by a pledge of the net revenues of all existing facilities and any additional facilities which may be financed in whole or in part by the issuance of consolidated bonds.[10]

With the adoption of the CBR the "self-supporting" facility concept which had governed earlier authority financing ceased to have the significance previously attached to it; for under the CBR the Authority's financial structure is based on a unitary enterprise concept and all revenues from all facilities are pooled. Individual facilities are not financed independently of the rest of the Authority. The facilities contribute their revenues for debt service on all Authority bonds according to their earning power and without regard to the amount of bonds issued for the construction of any particular facility.

While some facilities may not yield sufficient revenues to pay operating expenses and/or debt service requirements, what is of paramount concern to bondholders under the CBR is whether the total revenues of the Authority are sufficient to satisfy all of its obligations to bondholders. And in order to ensure that the abandonment of the "facility-by-facility" approach would not lead to a dilution of pledged revenues and reserves, the CBR contains covenants with the bondholders with respect to future operations and activities of the Authority and the issuance of bonds secured by a pledge of its revenues and reserves.

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[9]The Authority covenanted, by the CBR, that no additional general and refunding, air terminal or marine terminal bonds shall be issued.

[10]As noted *infra*, although general and refunding, air and marine terminal bonds are still outstanding, the Authority has fully funded its obligations to those bondholders and the consolidated bonds presently have a first call upon all revenues of the Authority.

One of the principal protections afforded bondholders by the CBR is the so-called "1.3 test" contained in section 3.[11] The 1.3 test prohibits the issuance of new consolidated bonds unless the best one-year net revenues of all of the Port Authority's facilities equal or are greater than 1.3 times the prospective debt service for the calendar year during which the debt service of all outstanding and proposed new bonds secured by a pledge of the general reserve fund would be at a maximum.[12] The 1.3 test is thus an equation in which one component consists of the Authority's net revenues from all facilities, and the other component is the maximum annual debt service required to be paid on all Authority bonds, including the new bonds to be issued. The maximum annual debt service component is readily calculable from the requirements set forth in the resolutions authorizing the bond issues.

[1] The annual net revenue component of the equation consists of the Authority's historical net revenues from existing facilities[13] plus the estimated average annual net revenues of the facility to be acquired or constructed with the issuance

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[11]While section 3 of the CBR provides alternate conditions for the issuance of consolidated bonds, in practice the 1.3 test described above is the least restrictive and has been the only one employed by the Port Authority since the adoption of the CBR. *Goldberg*, at 19.

[12]There is a dispute between the parties to this litigation whether a projected operating deficit of a facility to be acquired by the issuance of consolidated bonds must be deducted from net revenue for the purpose of determining whether the 1.3 test has been met. Under the terms of the CBR, if the facility to be acquired has been in operation for at least 36 months prior to the issuance of consolidated bonds, the annual operating deficit of the facility would be deducted from historical Authority net revenues in applying the 1.3 test. However, according to an Authority witness, if the facility to be acquired has not been in operation for at least 36 months, its projected operating deficit can be ignored. This view is contrary to the position of the Authority in statements made and testimony given to the Farley Committee. See *infra*, pages 152, 155–156.

[13]For this purpose the Authority is permitted to select any consecutive 12-month segment out of the 36-month period preceding the date of issuance of new consolidated bonds.

of new bonds.[14] While the 1.3 test speaks only of estimated net revenues and not of "deficits," it is evident from the purpose of the 1.3 test as well as Authority practice in arriving at historical net revenues that the estimated average annual *deficits* of a new facility must be charged against historical revenues in determining whether the 1.3 test has been met. The purpose of the 1.3 test is to protect existing bondholders against dilution of pledged revenues and reserves; if consolidated bonds are issued to acquire or construct a substantial deficit operation whose drain on Authority revenues is not included in the earning's component, the 1.3 test would be meaningless. Further, it is to be noted that in calculating historical net revenues of existing facilities the Authority arrives at one pooled figure which takes into account the deficits of such facilities.

Section 5 of the CBR directs the application of the pledged revenues to the payment of debt service upon all consolidated bonds, with the remaining balance to be paid into the consolidated bond reserve fund except to the extent necessary to be paid into the general reserve fund to maintain it at the level prescribed by statute.

Section 6 of the CBR provides that the payment of debt service upon all consolidated bonds "shall be further secured equally and ratably by the General Reserve Fund." Moneys in the general reserve fund may not be used for any purpose if there are other moneys of the Port Authority available for that purpose, unless there are sufficient funds available to the general reserve fund to pay debt service upon outstanding bonds during the ensuing 24 months, in which event such excess moneys could be used for any purpose permissible under the General Reserve Fund Act, whether or not other moneys were available for that purpose.

Section 7 of the CBR establishes a consolidated bond reserve fund into which all net revenues pledged as security

[14]The estimated average annual net revenue is based on estimated revenues for the first 36 months of operation of the new facility.

for consolidated bonds (after payment of debt service on all consolidated bonds and of amounts necessary to bring the general reserve fund to its statutory level) are required to be paid. The moneys in the consolidated bond reserve fund may be used only for the payment of: (a) consolidated bonds at maturity, retirement or redemption; (b) debt service upon outstanding consolidated bonds; (c) the deficit of any facility the net revenues of which were pledged as security for consolidated bonds, and (d) "any other additional purposes for which the Authority is now or may hereafter be authorized by law to expend the revenues of its facilities." The pledge of the net revenues of the Authority and of the moneys in the Consolidated bond reserve fund is subject to the right of the Authority to apply the revenues and the reserve fund as provided in section 7, and the right to issue bonds, other than consolidated bonds, secured by the reserve fund if such other bonds "are issued solely to fulfill obligations to or for the benefit of the holders of consolidated bonds and if such other bonds are also secured by a pledge of the General Reserve Fund."

Since the adoption of the CBR, capital expenditures of the Authority have been financed by the issuance of 41 series of consolidated bonds and short term notes. New facilities and improvements to existing ones have been funded without regard to the individual project's ability to generate income. This has enabled the Port Authority to undertake projects which would not be financially feasible alone but are possible because of the surplus revenues generated by its other facilities.[15] New projects undertaken since 1952 include the acquisition and/or construction of two heliports, the Brooklyn, Erie Basin, Elizabeth and Hoboken Marine Terminals, the Port Authority Trans-Hud-

[15]For the calendar year 1973, of the 22 facilities operated by the Authority, 14 were operated at a deficit, *i. e.*, the gross revenues were not sufficient to cover operating expenses and debt service requirements.

son (PATH) System, a bus terminal and the World Trade Center.

With respect to each series of consolidated bonds issued, the Authority adopts an authorizing resolution. Section 7 of each series resolution prohibits the issuance of any additional consolidated bonds or any other bonds to be secured by a pledge of the general reserve fund with respect to any facility or group of facilities as to which the Authority has not previously issued bonds unless

> * * * the Authority shall certify at the time of issuance its opinion that the issuance of such Consolidated Bonds or that such pledge of the General Reserve Fund as security for such bonds other than Consolidated Bonds will not, during the ensuing ten years or during the longest term of any of such bonds proposed to be issued (whether or not Consolidated Bonds), whichever shall be longer, in the light of its estimated expenditures in connection with such additional facility or such group of additional facilities, materially impair the sound credit standing of the Authority or the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds; and the Authority may apply monies in the General Reserve Fund for purposes in connection with those of its bonds and only those of its bonds which it has theretofore secured by a pledge of the General Reserve Fund in whole or in part.

Each consolidated bond states that it "is issued pursuant to and in full conformity with the Compact between the States of New York and New Jersey creating the Authority, and the various statutes of said two States amendatory thereof and supplemental thereto, for purposes provided in said Compact and statutes". No specific statute is mentioned in the bonds.

On December 31, 1970 the Authority placed in trust with the First National City Bank, as trustee, $60,749,000 from the Authority's special reserve fund, air terminal reserve fund and marine terminal reserve fund to secure fully, unconditionally and absolutely the Authority's obligation to provide for the redemption as scheduled and the payment of interest until redemption on the Authority's outstanding

general and refunding bonds, air terminal bonds and marine terminal bonds. After the establishment and during the maintenance of these trusts no further payments are required to be made into such reserve funds. As a result the pledge of Authority revenues and reserves to secure repayment of consolidated bonds is no longer subject to the prior lien in favor of the earlier series of bonds. The maintenance of the reserve funds in trust permits the application of all net revenues and reserves of the Authority to the payment of the consolidated bonds.

As of December 31, 1974 the issued and outstanding consolidated bonds of the Authority totaled $1,668,584,000,[16] the general reserve fund contained $173,487,000 and the consolidated bond reserve fund $46,800,000. Gross and net operating revenues for 1974 were $410,412,000 and $156,118,000, respectively. After debt service and sinking fund requirements were met the Authority had available for transfer to its reserve funds $67,018,000, resulting in a net increase in its reserves of $18,293,000 for the year.[17]

The Legislative History of the 1962 Covenant.

So far as the record reveals, the history of New Jersey's involvement with mass transit begins with the enactment of *chapter* 104 of the *Laws of* 1922. The Legislature there established the North Jersey Transit Commission[18] to study

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[16]This total includes $200,000,000 of bonds issued as the 40th and 41st series following the prospective repeal legislation of 1973, which are not "affected bonds" and hence not covered by the terms of the 1962 covenant.

[17]As at December 31, 1974 the Authority owed to various banks on short term loans $255,000,000. During 1974 the banks were repaid $40,000,000, plus interest, from the consolidated bond reserve fund, which accounts for the difference between the amount available for transfer to the reserve fund and the actual increase in the reserve fund balance at the end of the year.

[18]The preamble to the North Jersey Transit Commission Act of 1922, see *infra*, notes that the Port Authority Comprehensive Plan

and report upon plans for providing a comprehensive scheme of rapid passenger transit[19] between northern New Jersey communities and New York City. In its 1925 and 1926 reports this Commission noted both the urgent need for and complexity of a rapid transit plan for the northern New Jersey area which would furnish direct access to the midtown New York City area.

In 1927 the New Jersey Legislature authorized and directed the Port Authority to make plans to provide for rapid passenger transit between the states and within the Port District. Similar legislation was adopted in New York but was vetoed by Governor Alfred E. Smith, who in his veto message noted his unwillingness to have the Port Authority diverted from its principal objective of solving the freight distribution problems within the District. Governor Smith's veto to all intents and purposes ended any legislative effort to involve the Port Authority in an active role in commuter transit for the next 30 years.[20]

The years between 1928 and 1958 were devoted to largely fruitless efforts by numerous groups, agencies and commissions to devise a solution for mass transit within the metropolitan New York-New Jersey area. No useful purpose would be served in cataloging their failures — which were not failures of purpose, effort or imagination, but the failure to find the source of funds required to implement any plan. In the meantime the financial position of existing com-

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"does not include the problem of passenger traffic in the territory covered by said port development plan." *L.* 1922, *c.* 104.

[19]For the purpose of this opinion the term "rapid passenger transit" has reference to transportation of passengers by railroad and will be used interchangeably with the terms "commuter transit" and "mass transit," although the latter terms conceivably could involve means of conveyance other than by railroad.

[20]In 1936 the states requested the Port Authority to report on interstate and suburban passenger transportation. *Jt. Res. No. Laws* of 1936. The Port Authority filed its report in 1937, which disclaimed its financial ability to undertake a solution to the transit problems of the District.

muter transit facilities continued to deteriorate. By 1955 the Hudson and Manhattan Railroad had filed a petition for reorganization under the federal bankruptcy laws,[21] and the private railroads were petitioning the Interstate Commerce Commission for permission to abandon ferry service across the Hudson and to discontinue various passenger services because of substantial operating deficits.[22]

In 1958 the Metropolitan Rapid Transit Commission[23] issued a report to the states of New Jersey and New York setting forth a proposal for the construction of a trans-Hudson loop commuter transit system at an estimated capital cost of almost $500,000,000. The report noted the need to coordinate and to achieve a balance between highway and rail transportation systems. The Commission pointed out:

> That balance does not exist today. The automobile drivers and the bus operators make use of roadways, tunnels, bridges and central area terminals which are tax free and are either publicly maintained or publicly developed out of user taxes and user fees. Private railroad companies must raise the capital (and pay the interest on it) to build their rights-of-way and provide the operating facilities, and must maintain them and pay taxes on them. Since 1930, billions of public dollars have been spent, and are still being spent, by federal, state and local governments in the development of highways, bridges and other facilities for vehicular traffic, but no public funds whatever have been spent during the same period in promoting or improving

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[21]As of this date the four private companies which operate commuter railroad services in New Jersey are all being reorganized under federal bankruptcy laws.

[22]By 1959 the four commuter railroads operating in northern New Jersey sustained a total passenger operating deficit of $58,300,000. The New York commuter railroads had an aggregate deficit from commuter operations estimated at between $10,000,000 and $15,000,000 for 1960. The Staten Island Ferry operated at a loss of about $6,000,000 for the year, and the New York City Transit System had an operating deficit of $20,000,000, exclusive of debt service charges of $87,000,000.

[23]The New Jersey Metropolitan Rapid Transit Commission was created pursuant to *L.* 1952, *c.* 194 and was consolidated with its New York counterpart by *L.* 1954, *c.* 44.

mass transportation by rail between the New York and New Jersey portions of the Metropolitan Area.

The imbalance has resulted in a constant and relentless deterioration of suburban rail service. Ferries are being abandoned, train service is reduced, petitions are filed for abandonments, cars are getting older without being replaced. Repeated increases in fares in an effort to match rising costs and to establish earnings which can be used to improve the properties are resisted by public regulatory bodies. The result is more constriction of service by railroads, with consequent further congestion of highway facilities. One very grave consequence has been the creation of a stupendous cycle of traffic congestion in the streets, constantly calling for still further enormous expenditure of public funds for still further vehicular traffic.

Obviously, the people and the governments within this New York-New Jersey Metropolitan area are now face to face with this looming crisis, and can no longer avoid it by conveniently looking the other way.

Capital for the construction of the trans-Hudson loop must be raised by a public agency and bonds issued by it must have some measure of public guarantee to be saleable. Revenue bonds for transit purposes have a bad reputation in the bond market because of the financial history and condition of transit systems. While it would be desirable that the users of the loop would pay through fares the full capital and operating cost all experience conclusively demonstrates otherwise. On the other hand, the public interest requires that the fares be established at a level to foster maximum usage and utility of the system and provisions must be made for possible deficits. In addition, it must be recognized that capital for construction and equipment cannot be secured merely by evidence that revenues will equal costs.

A study which had been prepared for the Commission on the financial structure of the proposed commuter transit system had suggested that "financing would not be available from any of the existing public authorities since this action would in some cases impair the obligations of the authorities' covenants with bondholders and would seriously affect the ability of the authorities to discharge the responsibilities for which they were established." Nevertheless, during the 1958 session of the New Jersey Legislature a bill was introduced (Assembly Bill No. 16) which provided that the Port Authority take over and financially develop, improve and operate interstate passenger rail transportation between

New Jersey and New York. The Port Authority submitted a statement to the Legislature in response to this bill in which it said, among other things:

This opposition is based on the conclusion of the Commissioners that: (1) It is legally, financially and contractually impossible for the Port Authority to assume the railroads' increasingly heavy deficits from commuter operations or the cost of developing a new and comprehensive rail rapid transit system; and (2) The assumption of rail transit deficits by the Port Authority, the self-supporting agency of the two States, would immediately cripple and very quickly destroy the program of the two States now under way for the continued development of their essential public port and harbor facilities, airports, and interstate arterial systems.

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In addition to the General Reserve Fund, various special reserve funds have been created as a result of contractual commitments with bondholders in support of the various issues of Port Authority bonds. As in the case of the General Reserve Fund, the Authority may apply moneys in the Special Reserve Funds for purposes relating only to those of its bonds secured by a pledge of the General Reserve Fund, including purposes relating to facilities financed by such General Reserve Fund Bonds.

All Port Authority revenues not applied to operation and maintenance and debt service *must* be paid into one or another of these reserve funds. There are no excess revenues which are free of this contractual commitment to bondholders.[24] [Emphasis supplied]

In its statement to the 1958 Legislature the Authority suggested that even if it were possible to ignore legal restrictions on the use of Authority net revenues to finance commuter rail deficits, such a course of action would impair the Authority's credit standing and adversely affect the ability of the Authority to carry out its then existing programs. To reinforce this view the Authority solicited and included in its statement similar expressions of opinion from members of the investment banking community.

In January 1959 a joint report was issued on Assembly Bill No. 16 by the New Jersey Assembly Committees on

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[24]In view of recent developments it should be noted that in its statement the Authority also opposed an increase in tolls for the Hudson River crossing since this would constitute an "unfair tax" upon motorists to subsidize rail transit.

Highways, Transportation and Public Utilities, and on Federal and Interstate Transportation. This report concluded that the Port Authority could not be called upon to undertake the entire rail passenger transit obligation because (1) no one could estimate the size of the deficit operation the Authority would be undertaking, and (2) while the Authority could absorb some deficit, its operations, taken as a whole, must be self-supporting.

Pressures for financial aid to and Port Authority involvement in commuter transit continued to mount, and in 1960 the New Jersey Senate created a committee (known as the Farley Committee) to study the financial structure and operations of the Authority. One of the principal subjects investigated by the Farley Committee was the Authority's role in commuter transit. At the time the Committee's hearings commenced its immediate concern was to find a means to continue the operations of the bankrupt Hudson & Manhattan Railroad (H & M). The bankruptcy reorganization proceedings involving the H & M had reached the point where, in 1959, the District Court had left the H & M with sufficient cash for operations to continue for only two years. See *In re Hudson & Manhattan Railroad Co.*, 174 *F. Supp.* 148 (S. D. N. Y. 1959), aff'd *sub nom. Spitzer v. Stichman*, 278 *F.* 2d 402 (2 Cir. 1960). The Authority's Executive Director, Austin Tobin, testified before the committee concerning his discussions with New Jersey Highway Commissioner Dwight Palmer to have the Port Authority acquire and operate the H & M. Tobin testified in September 1960:

> Faced with these legal and contractual commitments [to the Authority's bondholders], which are the whole basis of the Authority's credit, Commissioner Palmer and the Port Authority have been examining, beginning with our initial exploration of the possibility on last February 15, whether bi-state legislation could be fashioned under which the Authority might even acquire and finance the bankrupt and deficit-ridden Hudson & Manhattan properties and finance its modernization by the Port Authority as a new Port Authority facility.

> In other words, could any legal and financial plan be worked out that would meet the foregoing contracts with investors and, from the standpoint of maintaining the Port Authority's credit, guarantee that the Authority would not thereupon become generally or further involved in the deficits of the commuter railroads, both in New York and in New Jersey? Obviously, unless such a covenant could be established no Port Authority bonds could be sold either for the acquisition of the Hudson & Manhattan properties or for any other Port Authority purpose.
>
> Thus the core of the problem is whether or not the two States could, to use a phrase about it, 'build a statutory fence around' the Hudson & Manhattan by guaranteeing to investors that the Authority would not and could not become involved in the large and increasing deficits of the New York and New Jersey commuter railroads, which with the New York subways total a deficit of something like $150,000,000 a year.

In January 1961 Commissioner Palmer appeared before the Farley Committee and expressed his conclusion that the Port Authority should purchase and operate the H & M provided limitations were placed upon the Authority's role in mass transit. On this subject he testified:

> The Port Authority in my opinion must make money and accumulate reserves for the rainy day if it is to be equipped to meet the needs of our two states of New York and New Jersey. It does not have general taxing powers. Its only taxes are the tolls it collects from the users of its facilities. Its shareholders are the public, you and I, and the institutions that buy the bonds. Since the cost of financing often determines the feasibility of a project it stands to reason that you and I get more for our toll dollar in the way of modern and safe facilities if we make certain that the credit rating of the Authority remains intact.
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> Now most of us realize that the matter of credit is not an exact science. The credit of an organization depends on quite a few factors; past performance, efficient management and calibre of personnel and markets for the product the institution has to sell; and last but not least — what investors think of the operation as a financial risk. It is, in the final analysis, the practical assessment of being repaid money that they lend to it.

Relating specifically to what ultimately became the 1962 covenant, Senator Wayne Dumont questioned Commissioner Palmer as follows:

Q. Commissioner, when the Port Authority made its proposal in September, at our hearings then, to take over the Hudson & Manhattan Tube, they surrounded their proposal with certain restrictions which, so far as I could tell were designed to eliminate any real obligation on the part of the Port Authority beyond taking over the Hudson & Manhattan Tubes, at least so far as the railroad field was concerned. Do you consider those restrictions that they surrounded this proposal with as reasonable ones? A. Yes, I do. And I have so stated in my proposal and I do it purely on the basis of what experience I may have had in the field of finance and industry, and of what we are hoping to obtain and acquire in the future in the expansion of facilities that the Port can supply.

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And it seems impossible, from all of my direct — and not through any other channels — direct contacts, to observe that money could be loaned for even the acquisition of the H&M in the event there was not some assurance that this just wasn't one bite of the cherry and that further transportation business was all to be pulled together. I think it's simply a question of whether the investor says yes or no, and at the present time my observation is the investor says no unless he has that limitation.

The following day the Port Authority's Vice-Chairman, James C. Kellogg, III, testified concerning the Authority's H & M plans. He emphasized that only by adopting what became the 1962 covenant could the Port Authority acquire and rehabilitate the H & M.

There is, of course, no possibility whatsoever that either the Port Authority or any one else could operate the H&M on a self-supporting basis. The bankrupt H&M has not paid a dividend since 1932; it has not been able to meet the interest on its bonded indebtedness and has been in receivership since 1954.

* * * * * * * *

On this estimate of the H&M losses [$5 million annually], and if we are able to satisfy prospective investors by statutory assurances that this proposal will not involve the Authority's General Reserve Fund in any other or further commuter deficit operations, we believe we can conscientiously certify, as we must under our indentures, that this financing will not impair the Port Authority's credit. On the other hand, if we are not in a position to cite such statutory assurances to those from whom we will have to borrow the money, and therefore, we are not in a position to make such a certification, we obviously would not be in a position to borrow money for the acquisition, let alone the improvement, of the H&M.

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All Port Authority revenues not applied to operation and maintenance and debt service *must* be paid into one or another of these

reserve funds. There are no excess revenues which are free from this contractual commitment to bondholders.

The most important pledges that the Port Authority has made to its bondholders are those relating to the issuance of bonds for new projects. These pledges were necessary since otherwise the security could be diluted, not only through the raiding of revenues and reserves, but just as disastrously by the unlimited issuance of bonds which have such revenues and reserves as their primary source of repayment.

It is because of this that the Port Authority had to covenant with its bondholders not to issue Consolidated Bonds supported by the General Reserve Fund for any new facility unless it can be demonstrated that, *including the new facility*, net revenues will be sufficient to cover by at least 1.3 times the maximum interest and principal payments due in any future year. Furthermore, bonds for a new facility cannot be issued with a pledge of the General Reserve Fund unless the Port Authority Commissioners certify that the issuance of the new bonds will not materially impair the sound credit standing of the Authority, the investment status of the Authority's bonds, or the ability of the Authority to fulfill its commitments and undertakings. Such protections for investors under open-end revenue bond issues are not uncommon.

Applied to the H&M proposal, I would like to make it clear that the question of whether or not we can borrow the $83,500,000 which is required, is not simply a question of whether or not we would have to pay a higher rate of interest on these funds. We can only submit to you the unanimous view of the Commissioners of the Port Authority that there is no possibility whatsoever of borrowing the money at all without a statutory assurance to investors that any future Port Authority responsibilities in the field of commuter rail transport over and above the present and existing interstate Hudson and Manhattan railroad system will not involve a pledge of the Port Authority's General Reserve Fund.

I say to you as a New Jersey Commissioner, and with all the sincerity that I can command, that there is nothing arbitrary or doctrinaire about this conclusion. It simply represents the Port Authority's credit. My business is investment financing and I say to you gentlemen that I could not sell a single Port Authority bond without such an assurance. If my responsibility were on the other side of the table, I would not buy a Port Authority bond that did not contain such an assurance. [Emphasis supplied]

Following Kellogg's prepared statement he was questioned by Senators Farley and Cowgill as to the binding effect

which the proposed covenant legislation could have on a subsequent legislature. The questioning proceeded as follows:

BY SENATOR FARLEY:

Q. Mr. Kellogg, I noticed in the latter part of your statement, you said you must be given assurance by the Legislature that if they directed the Port to proceed to purchase this property, they must make a pledge to the bondholders there be no further projects involving rail. Now I appreciate that if the Legislature directs you to enter into a contract involving the issuance of bonds, there will be no impairment of obligations of contract, but I must call to your attention and the members of your Commission that one Legislature cannot bind a subsequent Legislature involving policy. If, perchance, may I illustrate — ten, fifteen, twenty years from now the respective legislatures of New York and New Jersey importune your Port Authority Commission to do something in addition involving public service, one legislature cannot bind another involving policy. Do you follow me? A. I do.

Q. I appreciate the legal end of it involving obligation of contract, but in your statement that you be given assurance that no further services should be required of you involving rail forever hereafter — and how this legislature could bind a subsequent legislature I do not know. A. We'd have to say that to the bondholders, the ones that were going to purchase the new bonds, that we as Commissioners believe that this would not endanger the 1.3 ratio.

* * * * * * * *

BY SENATOR COWGILL:

Q. I want to clear one thing up. I got a little confused there for a minute on that policy business — in the event that the H&M were acquired on the basis of statutes passed by New Jersey and New York, they would not be called upon, that is, the Port Authority would not be called upon, to go into any further commuter problems of other roads. If bonds were issued under such legislation, you would not be able to issue any further bonds for anything else unless you were willing to certify that it would not — A. That's correct. It wouldn't say that the bonds couldn't be issued with a state guarantee later on for something else or something of that type, freight or anything else.

Q. It seems to me on that basis, that you enter a contract on the basis of legislation passed, that contract is going to stand and some later legislature is not going to be able to change it. A. That's right.

SENATOR FARLEY:

My question, Senator, was — and I appreciate we cannot impair obligations: In effect, would any commitment with the present legislature estop or attempt to estop any legislation involving public needs in the future? [No answer was given at this point].

Commissioner Clancy of the Port Authority followed Commissioner Kellogg to the stand and the following colloquy took place directed to the same point:

SENATOR FARLEY:

I say to you as a commissioner representing New Jersey we too have a responsibility of making sure that this is done thoroughly, intelligently and in a way that would be feasible and practical. It was testified today by Mr. Kellogg that the Port should not be bound by any other demand from the State Legislature relative to rail service. I pointed out to him — and may I say to you as a lawyer — we well appreciate that any direction we give you by enacting legislation, we could not impair any obligation such as contracts of bond issues. Likewise, you as a lawyer know that one legislature cannot bind the other involving policy five, ten, or twenty years hence. A. I appreciate that.

Q. So that when this Committee makes its report, we are not exonerating the Port from any responsibility for any demand for future public service by either the New York or New Jersey legislature. I want you to appreciate that fact. A. I appreciate that fully and I am aware of the fact if a situation such as that would arise in the future, that would be a matter that we would have to discuss on its own merits with a future Governor and future legislature.

Q. That's right.

* * * * * * * *

MR. TOBIN:

May I say something?

SENATOR FARLEY:

I want to call you, Mr. Tobin, relative to this situation. If you want to interject something at this time, we will be very happy to have you do so.

MR. TOBIN:

You might want to know that this legislative assurance, as Commissioner Kellogg pointed out, would only apply to future commuter

operations and only limits the use of the pledge of the general reserve fund. It only limits the pledge of the general reserve fund, nothing else. It would not typically bar Port Authority participation where some other scheme of guarantee of the bonds or something like that—

SENATOR FARLEY:

That would have to depend on its own merit or demerit and then be considered. But I call to your attention as a Commissioner the problem of the Legislature.

I am aware of the problem, but, of course, the action that is taken now with reference to the Hudson and Manhattan would not necessarily of itself bar future participation in the problem generally. It would, however, not be possible if that future participation involved any impairment of this reserve fund.

While the Farley Committee hearings were in progress the New York Legislature adopted legislation directing the Port Authority to acquire and operate the H&M, *Laws of N. Y.* 1961, *c.* 312, without any covenant against or limitation upon future Authority involvement in passenger rail transit. This legislation was not acceptable to the New Jersey Legislature because "the absence of such a covenant * * * endangered the future utility of the Port Authority to the two States." *Report of Senate Investigation Committee Under Senate Resolution Number 7 of the Year 1961,* at 23. The Committee's report, which was issued in 1963, notes that it sponsored the 1962 covenant legislation so as to limit

* * * by a constitutionally-protected statutory covenant with Port Authority bondholders the extent to which the Port Authority revenues and reserves pledged to such bondholders can in the future be applied to the deficits of possible future Port Authority passenger railroad facilities beyond the original Hudson & Manhattan Railroad system. [*Id.* at 24]

The 1962 covenant legislation was passed unanimously by both houses of the New Jersey Legislature on February 13, 1962 and Governor Hughes signed the bill on the same day. The New York Legislature followed suit on March 7, 1962, *Laws of N. Y.* 1962, *c.* 209, and the covenant legislation be-

came effective upon Governor Rockefeller's signature on March 27, 1962.

L. 1962, *c.* 8, authorized the Port Authority to proceed with the acquisition, construction and operation of a port development project which would include the World Trade Center and the H&M. *N. J. S. A.* 32:1–35.52. For this purpose the Authority was authorized to issue bonds for the project secured by a pledge of the general reserve fund. *N. J. S. A.* 32:1–35.53. The preamble of the act reflects the following legislative findings relevant to the H&M acquisition:

The States of New York and New Jersey hereby find and determine:

(1) that the transportation of persons to, from and within the Port of New York and the flow of foreign and domestic cargoes to, from and through the Port of New York are vital and essential to the preservation of the economic well-being of the northern New Jersey-New York metropolitan area;

(2) that in order to preserve the northern New Jersey-New York metropolitan area from economic deterioration, adequate facilities for the transportation of persons must be provided, preserved and maintained and that rail services are and will remain of extreme importance to such transportation of persons;

(3) that the interurban electric railway now or heretofore operated by the Hudson & Manhattan Railroad Company is an essential railroad facility serving the northern New Jersey-New York metropolitan area, that its physical plant is in a severely deteriorated condition, and that it is in extreme financial condition;

(4) that the immediate need for the maintenance and development of adequate railroad facilities for the transportation of persons between northern New Jersey and New York would be met by the acquisition, rehabilitation and operation of the said Hudson & Manhattan interurban electric railway by a public agency, and improvement and extensions of the rail transit lines of said railway to permit transfer of its passengers to and from other transportation facilities and in the provision of transfer facilities at the points of such transfers;

* * * * * * * *

(8) that the Port of New York Authority (hereinafter called the port authority), which was created by agreement of the 2 States as their joint agent for the development of the transportation and terminal facilities and other facilities of commerce of the port district and for the promotion and protection of the commerce of their port, is the proper agency to act in their behalf (either directly or by or through wholly-owned subsidiary corporations) to effectuate, as

a unified project, the said interurban electric railway and its extensions and the [World Trade Center] * * * [*N. J. S. A.* 32:1–35.50]

The operative provisions of the covenant are contained in the first paragraph of § 6 of *chapter* 8, *N. J. S. A.* 32:1–35.55, and they are as follows:

The 2 States covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, (a) the 2 States will not diminish or impair the power of the port authority (or any subsidiary corporation incorporated for any of the purposes of this act) to establish, levy and collect rentals, tolls, fares, fees or other charges in connection with any facility constituting a portion of the port development project or any other facility owned or operated by the port authority of which the revenues have been or shall be pledged in whole or in part as security for such bonds (directly or indirectly, or through the medium of the general reserve fund or otherwise), or to determine the quantity, quality, frequency or nature of the service provided in connection with each such facility; and (b) neither the States nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth.

"Affected bonds" are defined as including all bonds secured in whole or in part by the general reserve fund or any other reserve fund established by contract between the Authority and the holders of its bonds. Since all consolidated bonds are secured by a pledge of the general reserve fund, as well as the consolidated bond reserve fund, all outstanding consolidated bonds, with the exception of those of the 40th and 41st series,[25] are affected bonds under the terms of the covenant.

"Permitted purposes" as defined in the statute include: (1) the H&M as it existed on the effective date of the legislation;

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[25]See *infra* at 179–180.

(2) any railroad freight facilities owned by the Authority; (3) railroad tracks on vehicular bridges owned by the Autority; and (4) passenger railroad facilities (other than the H&M) only if one of two conditions is met: (i) the Authority certifies that such other railroad facility is self-supporting, or (ii) if the general reserve fund contains the required statutory amount (10% of all outstanding Authority bonds) and the Authority certifies that the deficit of such other facility, together with the deficits of all other passenger railroad facilities owned by the Authority, will not exceed "permitted deficits" as thereafter defined.

A passenger railroad facility may be certified as "self-supporting" if its estimated average annual net operating income for the first ten years of operations is at least equal to the estimated average annual debt service on bonds issued in connection with the facility.

A passenger railroad "deficit" is defined as the average estimated annual debt service upon the bonds issued for passenger railroad purposes over the first ten-year period of operations less the average estimated annual net operating income of the railroad facility, or plus the average estimated annual net loss of the railroad facility. To illustrate: If the average annual debt service requirement is $10,000,000 and the average annual net operating income is $5,000,000, the statutory deficit is $5,000,000. If it is estimated that an average annual net loss of $5,000,000 will be incurred from operations, the statutory deficit would be $15,000,000.

A "permitted deficit" is a deficit which does not exceed (A) the amount of the passenger railroad deficit the payment of which one or both states is willing to guarantee for the period for which the Authority would be liable for such deficit, plus (B) the greater of (1) an amount equal to 10% of the general reserve fund at the end of the preceding calendar year less an amount equal to 1% of the Authority's bonds outstanding at the end of the preceding calendar year which were issued for passenger rail purposes (including the H&M), or (2) an amount equal to 10% of the amount

calculated under clause (1) plus 1% of the Authority's equity in all facilities other than passenger rail facilities.

Thus, assuming the States of New York and New Jersey enter into an agreement with the Authority to pay the deficit of a proposed passenger railroad facility, the deficit of such facility is a permitted deficit under the 1962 covenant and the Authority is authorized to issue its bonds for such purpose. In the absence of a guarantee by the states to pay any part of the deficit, the maximum permitted deficit must be calculated under (B) as reflected in the following illustration: Assuming the general reserve fund contains $175,000,000 and the Authority has outstanding bonds issued for the H&M and other passenger railroad purposes in the amount of $150,000,000, clause (1) permits the Authority to issue bonds secured by the general reserve fund if the estimated average annual deficits of all its passenger rail facilities, including the proposed facility, do not exceed $16,000,000 ($17,500,000 – $1,500,000). Assuming the same facts and an Authority equity in nonrailroad facilities of $1,200,000,000, under clause (2) the permitted deficit would be $13,600,000 ($1,600,000 + $12,000,000). Hence, on the assumed facts, since the amount calculated under clause (1) is greater, the permitted deficit would be $16,000,000[26].

On September 1, 1962, following enactment of the 1962 covenant legislation referred to above, the Port Authority, through a wholly-owned subsidiary (Port Authority Trans-Hudson Corporation or PATH), assumed ownership and operating responsibilities over the H&M. The Commissioners' 1962 certification with respect to the acquisition of the PATH System was made on the basis of an opinion of A. Gerdes Kuhbach, the Director of Finance of the Port Authority,

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[26]Since the annual deficits of the H&M (operated by the Authority under the acronym PATH) are substantially in excess of the permitted deficits calculated under 1963 covenant formula, the covenant prohibits the Authority from issuing any bonds for passenger rail purposes which would be secured by a pledge of the reserve funds of the Authority. See *infra* at 165.

which was prepared at the request of the Commissioners. His opinion analyzed and reviewed the financial aspects and data relating to the proposed acquisition, rehabilitation and operation of the PATH system. He concluded that the section 7 certification required under the series consolidated bond resolutions could be made, since the anticipated net loss after debt service for the years 1969 through 1991 would level off at approximately $6,595,000[27] per year, an amount that would not impair the sound credit rating of the Port Authority. More specifically, Kubach concluded that

> a) There is always a comfortable margin between the anticipated net loss and 10% of the estimated General Reserve Fund;
>
> b) Net revenues available for Reserves will not be materially diluted by undertaking the acquisition, rehabilitation and operation of the Hudson Tubes:
>
> c) The coverage of both annual obligatory long term debt service and future maximum debt service is sufficiently within the limits necessary to preserve the Port Authority's credit and to continue the issuance of Consolidated Bonds.
>
> I therefore conclude that the application of all or any portion of unexpended proceeds of Consolidated Bonds, Nineteenth Series, Due 1991, will not during the years 1962 through 1991, in light of the estimated expenditures in connection with the Hudson Tubes, materially impair the sound credit standing of the Authority or the investment status of the Consolidated Bonds or the ability of the Port Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds.

Since the enactment of the 1962 covenant the Port Authority has referred to the covenant in all official statements furnished to the public in connection with each series of consolidated bonds issued by the Authority. The reference is set forth under the heading "Statutory Covenant With Prior Affected Bondholders Against Dilution of Pledged Revenues and Reserves by Additional Passenger Railroad Deficits," and the terms of the covenant are then summarized. The first two sentences of text read as follows:

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[27]In 1962 the general reserve fund was approximately $69 million.

In connection with the legislation which authorized the Port Authority to assume responsibility for the Hudson Tubes system the Port Authority had advised the Legislatures of both States that the credit of the Port Authority would be impaired by such an undertaking of an anticipated perpetual deficit facility unless the States would enter into an enforceable contract with the Port Authority bondholders which would grant assurances against dilution of already pledged revenues and reserves by any additional passenger rail deficits beyond those of the basic Hudson Tubes System. The legislation as finally adopted includes such statutory covenants.

As of December 31, 1973 the Authority had invested $185,800,000 of its funds in the acquisition and improvement of PATH. The accumulated operating deficits of PATH (determined in accordance with ICC accounting practices) total $125,000,000,[28] of which approximately $17,000,000 constitutes depreciation. PATH has incurred an annual deficit after debt service for each of the last five years in excess of 10% of the general reserve fund. Accordingly, under the 1962 covenant the Port Authority would be precluded from pledging any of its revenues or reserves to any other deficit passenger railroad operation. In 1973, using the Authority's accounting procedures, the PATH deficit for the year, including debt service, was $24,913,000.

Following the enactment of the 1962 covenant legislation an action was instituted in the New York state courts challenging the validity of the statute by New York property owners. The principal issues presented in the action dealt with the legislative authorization to the Authority to construct the World Trade Center. The plaintiffs urged, among other things, that the legislation was unconstitutional because no congressional consent had been obtained. The New York Court of Appeals upheld the constitutionality of the covenant legislation, and the appeal therefrom was dismissed by the United States Supreme Court for want of a substantial fed-

[28]Using the Authority's method of accounting, the accumulated PATH deficit as of December 31, 1973 was $153,073,000, inclusive of debt service.

eral question. *Courtesy Sandwich Shop v. Port of N. Y. Auth.*, 12 *N. Y.* 2d 379, 240 *N. Y. S.* 2d 1, 190 N. E. 2d 402, app. dism. 375 *U. S.* 78, 84 S. Ct. 194, 11 L. Ed. 2d 141, *reh. den.* 375 *U. S.* 960, 84 S. Ct. 440, 11 L. Ed. 2d 318 (1963). The Court of Appeals disposed of the consent argument in the following manner:

This argument must fail because, assuming consent to be required for this sort of concurrent action, the congressional consent originally given in 1921 and 1922 to the bi-State compact creating the Port Authority expressly contemplated such further co-operative legislation in furtherance of port purposes as was here accomplished. * * * Among the Articles of Agreement consented to were articles III, VII and VI, which created the Port Authority with the powers enumerated plus "such other and additional powers as shall be conferred upon it by the legislature of either State concurred in by the legislature of the other." Similarly, article XI, following the agreement for an initial comprehensive plan in article X, provides that the Port Authority should "from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two States, they shall be binding upon both States with the same force and effect as if incorporated in this agreement." Chapter 209 clearly falls within the congressional consent given to the articles contemplating the grant to the Port Authority of additional powers within the framework of the compact. [12 *N. Y.* 2d at 391, 240 *N. Y. S.* 2d at 7, 190 N. E. 2d at 406]

The lack of congressional consent to the covenant legislation was also raised by Port Authority bondholders in *Port Authority Bondholders Pro. Com. v. Port of N. Y. Auth.*, 387 *F.* 2d 259 (2 Cir. 1967). The Court of Appeals affirmed the dismissal of the bondholders complaint, having concluded that the United States Supreme Court's disposition in *Courtesy Sandwich Shop* had labeled the question "as unsubstantial." 387 *F.* 2d at 262.

In 1971 Theodore Kheel, Esq., and others instituted a class action in the United States District Court for the Southern District of New York challenging the constitutionality of the 1962 covenant on the grounds that it restricted the Authority's power to devote its revenues to nonself-supporting passenger rail facilities, in violation of the Compact and

Commerce Clauses of the United States Constitution, and impaired legislative sovereignty. The District Court dismissed the complaint, relying in part upon the disposition made in *Courtesy Sandwich Shop. Kheel v. Port of N. Y. Auth.*, 331 *F. Supp.* 118 (S. D. N. Y. 1971), aff'd on other grounds, 457 *F.* 2d 46 (2 Cir. 1972), *cert. den.* 409 *U. S.* 983, 93 S. Ct. 324, 34 L. Ed. 2d 248 (1973).

Legislative History of the Repeal of the 1962 Covenant.

Despite the enactment of the 1962 covenant, during the latter part of the 1960's and continuing to date there has been increasing public and governmental demand for the Port Authority to make a greater contribution toward a solution of the mass transit problems within the Port District. The critics of the Port Authority, as well as responsible executive and legislative officials, have focused primarily upon the utilization of the surplus earning capacity of the Authority's existing facilities to finance further Authority acquisition of or direct subsidies to mass transit facilities. It may be noted that between 1961 and 1970 the net revenues of the Authority had increased from $68,000,000 to $115,000,000, and over that period the Authority had available to it $454,000,000 in funds in excess of its debt service requirements.

In July 1964 Congress enacted the Urban Mass Transportation Act of 1964 (49 *U. S. C. A.* §§ 1601 *et seq.*), expressing for the first time a federal legislative interest in the support of urban mass transportation systems. In enacting the 1964 act Congress found (49 *U. S. C. A.* § 1601(a)):

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) the Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

The purposes of the 1964 act were declared to be (49 *U. S. C. A.* § 1601(b)):

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economic and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

The scope of the 1964 act was expanded by the Urban Mass Transportation Assistance Act of 1970 on the basis of a finding by Congress (49 *U. S. C. A.* § 1601a) that "the rapid urbanization and the continued dispersal of population and activities within urban areas has made the ability of all citizens to move quickly and at reasonable cost an urgent national problem."[29]

In April 1970 Governors Cahill and Rockefeller announced a joint program to increase the Port Authority's role in mass transportation by building a rail link to John F. Kennedy International Airport and extending PATH to Newark International Airport and other parts of New Jer-

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[29] In November 1974, after the repeal of the 1962 covenant, Congress enacted the National Mass Transportation Assistance Act of 1974, which provided $11.8 billion over the next six years for mass transit capital expenditures and, for the first time, operating subsidies on a matching basis.

sey. Bills were introduced in the New Jersey and New York Legislatures authorizing the Port Authority to undertake mass transportation projects providing access to John F. Kennedy and Newark International Airports. In March 1971 joint hearings were held in New York and New Jersey by the New York State Assembly Committee on Corporations, Authorities and Commissions and by the Autonomous Authorities Study Commission of the New Jersey State Legislature with respect to the relationship of the Port Authority to mass transportation and the proposed passenger rail links to the airports. In June 1971 the Legislatures of New York and New Jersey enacted legislation authorizing the Port Authority to extend passenger rail transportation to Kennedy International Airport and to Newark International Airport and Cranford. *L.* 1971, *c.* 245; *N. J. S. A.* 32: 1–35.20 *et seq.* The sponsors of this legislation sought to avoid the limitations of the 1962 covenant by characterizing the proposed new railroad facilities "as constituting a part of each air terminal" rather than independent passenger railroads. *L.* 1971, *c.* 245, § 1. While this legislation was pending, the Port Authority obtained opinion letters from two New York law firms which concluded that the proposed rail extensions were subject to the provisions of the 1962 covenant and could not be financed out of Port Authority revenues or reserves unless "self-supporting" since PATH had used up all of the "permitted deficits" allowed by the covenant.

Following the enactment of the 1971 legislation the Commissioner of the New Jersey Department of Transportation commissioned a consulting firm to report on the Authority's ability to finance and operate the New Jersey PATH extension under the terms of existing covenants with bondholders, and to propose alternative financing programs if the Authority could not. The consultant's report was submitted in December 1971. At the outset it was noted that on the assumption the proposed additional facilities would operate

at a deficit, the 1962 covenant prohibited Authority financing and operation since the PATH deficit already exceeded the "permitted deficits" allowed by the covenant. The conclusion of the report was that the Port Authority was not, under the 1962 covenant, in a "favorable position" to provide the additional financing necessary for the proposed extensions of existing passenger rail facilities. The consultants recommended as an alternative solution the removal of PATH from the Authority's control so that the latter would no longer be responsible for its deficits.

In June 1972 the Port Authority and New Jersey Department of Transportation concluded on the basis of an engineering cost study that the proposed extension of PATH via Newark Airport to Cranford was not economically feasible under the terms of the 1962 covenant.

In the same month the State of New York passed a bill repealing the 1962 covenant. *Laws of* N. Y. 1972, *c.* 1003. Governor Rockefeller's message on the signing of that legislation stated:

> I am approving this bill in order to give incentive to the Port of New York Authority to proceed with urgently needed mass transportation facilities in the metropolitan region.
>
> Passed with overwhelming bipartisan support in both houses of the Legislature, the bill removes the absolute statutory prohibition against the use of the revenues of the Port of New York Authority for railroad purposes. That statutory covenant, together with the provision of the bi-state compact creating the Authority that neither State will construct competing facilities within the Port District, could forever preclude the two states from undertaking vitally needed mass transportation projects. In removing the present restriction, the bill would not jeopardize the security of Port Authority bondholders or their rights to maintain that security.
>
> * * * * * * * *
>
> New York, by the enactment of this measure, is taking an essential step in its long-range effort to realize the full potential of the Port Authority in meeting the total transportation needs of the New York-New Jersey port district. The Port Authority's active participation in helping to solve the problems of mass transportation in the New York City metropolitan area will inure to the benefit not only of millions of area residents generally, but also to the port facilities operated by the Authority and the workers and businesses that rely

on them. This bill is consistent with the original purpose of the Port Authority — to ensure the coordinated development of terminal, transportation and other facilities of commerce in and about the port district for the greater benefit of the people of New York and New Jersey.

The repeal of the 1962 covenant adopted by New York proved to be unacceptable at that time to the New Jersey Legislature and Governor Cahill, and on November 15, 1972, following a series of meetings among Governors Cahill and Rockefeller and the Commissioners of the Port Authority, the Governors announced agreement on a bi-state plan of passenger rail transportation development by the Port Authority. The plan provided for the extension of PATH via Newark Airport to Plainfield, direct rail service from Kennedy Airport to New York City, and direct rail service to Penn Station, New York, for riders of the Erie Lackawanna Railroad in six northern New Jersey counties and two counties in New York. The estimated total cost of the plan was $650,000,000 and it was estimated that the Port Authority would invest between $250,000,000 and $300,000,000, with the balance of the funds being furnished by grants from the Federal Urban Mass Transportation Administration and the states. The Governors also proposed to repeal the 1962 covenant with respect to bonds issued subsequent to the enactment of the legislation proposed by the Governors.

On December 11, 1972 the New Jersey Senate held an information session to consider pending Port Authority mass transit bills. During this session representatives of the Port Authority and of Governor Cahill's office stated that the State of New Jersey would have to commit substantially all of the funds then available to the State of New Jersey from the Federal Urban Mass Transportation Administration.

The legislation embodying the 1962 covenant was amended by the State of New Jersey on December 28, 1972, *L.* 1972, *c.* 208, so as to repeal the 1962 covenant with respect to

Authority bonds issued after the effective date of the legislation. The New York Legislature enacted concurrent legislation which became effective on May 10, 1973. *Laws of N. Y.* 1973, *c.* 318.

On April 22, 1974 the New Jersey Legislature enacted *chapter* 25 of the *Laws of* 1974 (the "repeal act"). Governor Byrne signed the bill on April 30, 1974. Section 1 of this act repealed section 3 of *chapter* 208 of the *Laws of* 1972, the effect of which is to repeal, retroactively, the 1962 covenant as to all issued and outstanding "affected bonds" issued by the Port Authority. The introducer's statement annexed to the Assembly Bill No. 1304 (which became *chapter* 25), sums up the intent and purpose of the action taken:

This bill is designed to preclude the application of the 1962 covenant restricting port authority participation in mass transit projects. Chapter 208, P. L. 1972, precluded such application to bonds newly issued after the effective date of that act, but maintained in status quo the position of holders of bonds issued between March 27, 1962 and December 28, 1972. Since affected bonds are outstanding until the year 2007, the restrictions imposed by the covenant effectively preclude sufficient port authority participation in the development of a public transportation system in the port district. In 1972 the State of New York passed legislation precluding the application of the 1962 covenant from outstanding bonds as well as newly issued bonds. It is the purpose of this act to accomplish effective repeal of the covenant.

Concurring legislation was signed into law by Governor Wilson of New York on June 15, 1974. *Laws of N. Y.*, *c.* 993. Governor Wilson issued a statement when he signed the bill, in which he said in part:

In response to my inquiry, the Chairman of the Port Authority has also advised me that because of the heavy long term capital commitments for the PATH facilities and the Kennedy rail link, the Authority has no significant capacity to contribute funds for operating subsidies for commuter railroads. Hence, the plain and simple fact of the matter appears to be that the Authority has virtually no excess funds that could be channeled into operating subsidies for mass transportation facilities in the New York metropolitan area.

Even if such funds were available, existing bond indenture provisions which survive despite repeal of the statutory covenant would prohibit their use except in relation to facilities owned, leased or operated by the Port Authority.

The legislative history of the repeal of the covenant would not be complete without reference to other developments which were of immediate and continuing concern to the states and the nation at or about the time the repeal legislation was enacted. Commencing in the early 1950's and continuing to date the two states initiated studies of air pollution problems in their jurisdictions, and legislative action to control air pollution was undertaken by New Jersey as early as 1954, see *N. J. S. A.* 26:2C–1 *et seq.*, and by New York in 1957, see *Laws of N. Y., c.* 931. In 1955 the United States Congress enacted the Clean Air Act, 42 *U. S. C. A.* § 1857 *et seq.*, the preamble of which sets forth the following findings (among others):

(a) The Congress finds —

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration and property, and hazards to air and ground transportation.

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments * * *

The studies which were undertaken identified automobile exhaust emissions as a significant contributing factor in air pollution, and as the primary source of air pollution in the City of New York. In 1962 the State of New York adopted legislation requiring the installation of positive crankcase devices on new cars. *Laws of N. Y.* 1962, *c.* 994. While similar legislation was not enacted in New Jersey, the State did institute on February 1, 1974 an auto emission

testing program as part of the mandatory motor vehicle inspection system.

The efforts of the states to alleviate health hazards associated with air pollution were given a major impetus by the congressional enactment in 1970 of amendments to the federal Clean Air Act, 42 *U. S. C. A.* § 1857(*c–l*) *et seq.*, pursuant to which the Administrator of the federal Environmental Protection Agency was authorized to establish national air quality standards and to prescribe, upon the failure of a state to do so, the steps necessary to achieve compliance with those standards.

On November 13, 1973, after the State of New Jersey failed to present an acceptable plan for achieving compliance with the national air quality standards for hydrocarbons and carbon monoxide, the federal Administrator promulgated regulations designed to achieve a major reduction in hydrocarbon and carbon monoxide pollution in the northern part of New Jersey. 38 *Fed. Reg.* 31388 *et seq.* The federally-mandated plan for New Jersey included the mandatory use of retrofit devices on gasoline-powered vehicles and "the application of certain transportation control measures including a requirement for a significant reduction in vehicle miles traveled." 38 *Fed. Reg.* 31389. The Administrator also emphasized the importance of the development of mass transit to the effort to improve New Jersey's air quality:

The development of large-scale mass transit facilities and the expansion and modification of existing mass transit facilities is essential to any effort to reduce automotive pollution through reductions in vehicle use. The planning, acquisition, and operation of a mass transit system is, and should remain, a regional or State responsibility. Many improvements are being planned in mass transit facilities in the State that will make it possible for more people to use mass transit instead of automobiles. * * * [38 *Fed. Reg.* 31389]

Finally, reference must be made to the energy crisis, the dimensions of which became a matter of national concern in the fall of 1973 with the imposition of an oil embargo by

Arabian suppliers of crude oil and the rapid escalation of the price of oil. On February 4, 1974, two months before the repeal legislation was enacted, the New Jersey Legislature passed the Emergency Energy Fair Practices Act of 1974 (*L.* 1974, *cc.* 2, 6).

Section 2 of that act stated:

> **The Legislature finds and determines that because of world conditions and the manner in which energy sources and fuels are allocated and distributed that an energy shortage now exists and may continue for the foreseeable future.**

Section 3 of the act authorized the Governor "to proclaim by Executive Order the existence of an energy emergency" and to establish a State Energy Office and appoint an Administrator with broad powers to control the use and distribution of all fuels. On February 5, 1974 Governor Byrne issued Executive Order No. 1 in which he proclaimed the existence of an energy emergency, created the State Energy Office and established the position of Administrator of that office.

In December 1973 the Regional Plan Association issued a report on the relationship of the energy crisis to transportation. Its findings noted the decline of public mass transit in the metropolitan region and the increased consumption of fuel caused by reliance upon private automobiles to satisfy the major passenger transportation demand of the region. The Association pointed out that

> **If we are serious about meeting a profligate demand for energy over the long pull, we will have to begin now to design a Region that is less energy consumptive in transportation and in its development pattern.**

While the immediate effects of the oil embargo have been dissipated, the nation is still confronted with the long-range effects of oil price increases, particularly as they bear upon the economic well-being of the country. On February

21, 1974 President Nixon described the problem in these terms in a special message to Congress on the energy crisis:

> **We must also face the fact that when and if the oil embargo ends, the United States will be faced with a different but no less difficult problem. Foreign oil prices have risen dramatically in recent months. If we were to increase our purchase of foreign oil, there would be a chronic balance of payments outflow which, over time, would create a severe problem in international monetary relations. [*U. S. C. Cong. and Admin. News*, 93rd Cong., 2d Sess. at 36.]**

The President further observed, "it is widely recognized now that the development of better mass transit systems may be one of the key solutions to both our energy and environmental problems." *Id.* at 42. Congress has repeatedly made similar findings. For example, the Regional Rail Reorganization Act of 1973, enacted on January 2, 1974, contains specific findings by Congress that "rail service and rail transportation offer economic and environmental advantages with respect to * * * energy efficiency and conservation * * * to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest," and that "railroads are one of the most energy-efficient modes of transportation for the movement of passengers and freight." 45 *U. S. C. A.* §§ 701, 761.

Bondholder Reliance on the 1962 Covenant and the Effects of Repeal.

Commencing with the issuance of the 20th series of 1962 the Authority advised potential investors of the existence of and protection afforded by the 1962 covenant by including detailed reference to the covenant in the official statements distributed to the public. U. S. Trust alleges in its complaint that purchasers of the Authority's consolidated bonds relied on the notice thus given to them in making their purchases. It is also alleged that the repeal of the covenant has diminished and will continue to adversely

affect the value of the bonds in the secondary market.[30] These issues were the subject of a trial at which U. S. Trust produced four witnesses in its behalf, together with numerous exhibits. Defendants relied upon cross-examination of plaintiff's witnesses plus their own exhibits.

Port Authority consolidated bonds are known in the market place as revenue bonds, *i. e.*, they are payable solely from the revenues and reserve funds derived from the facilities operated by the Authority. In the main these bonds are sold to relatively sophisticated institutional investors either for their own accounts or for the accounts of others whose investment funds they manage. Since the bonds carry a fixed rate of return and must compete against other similar types of securities available in the market place, the interest rate fixed when the bonds are initially marketed, as well as the price of the bonds in the secondary market, will normally reflect the investor's evaluation of the underlying security of his investment and the prevailing interest rates available on similar types of securities.

Prior to 1962 the Authority had successfully marketed several hundreds of millions of dollars of its consolidated bonds without the existence of the covenant. Presumably those issues were marketed on the strength of the Authority's overall revenues and reserves as well as in reliance on the previously enacted statutory covenants and the covenants contained in the CBR. The interest rates on these bond issues varied from a low of 2¼% (the 2nd and 4th series) to a high of 4¼% (16th series). The interest rate on the last bond issue offered prior to the enactment of the covenant was 3½% (19th series).

In the early 1960's, prior to the enactment of the 1962 covenant, the likelihood of legislation directing the Authority to take over the H & M became apparent. The record strongly suggests that the Authority itself took the

[30]The secondary market in this context refers to the over-the-counter price at which the bonds are traded after the initial offering.

initiative in arousing the concern of the investment banking community to the implications of such legislation for the future financial well-being of the Authority. Whether this action was attributable to the Authority's fear of the "disease" of mass transit, see *Goldberg*, at 22, or a legitimate concern as to the Authority's ability to absorb substantial mass transit deficits is not the point; the fact of the matter is that the Legislature of 1962 concluded it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority.

The fact of the covenant's existence and its terms were communicated to the public and were a matter of general knowledge among investment bankers, institutional investors and dealers in Authority bonds. It may fairly be said, however, that few, if any, members of the investment community ever analysed closely the actual effect of the 1962 covenant upon bondholder security. The principal witness offered by U. S. Trust in support of its contentions, John F. Thompson, whose credentials and qualifications are impeccable, when asked to compare the protections afforded bondholders by the 1962 covenant with the restrictions imposed by the CBR (*i. e.*, the 1.3 test and the section 7 certification required by the bond series' resolutions), testified:

> Well the 1962 covenant and its requirements, require more specific determinations by the commissioners, by the staff and the commissioners as to the earnings or prospects of deficits involved, and they are — well, in the case of the Section 7 requirements, the commissioners can simply rule or state their opinion that the requirement would not harm the holders of the outstanding debt. In the case of the 1.3 times, they are permitted estimates of future earnings to some degree as well as the historical earnings. This is a test which might be complied with on the initiation of a deficit rail facility, and later be found to have not avoided deficits by any means as given the propensity of these deficits to greatly increase.
>
> The determinations which must be made under the covenant, I believe, are much more susceptible to active testing, by those looking at the Port Authority from the outside, and those in the investment community a much more secure feeling about the future profitability of the Port Authority.

Based upon the testimony offered by plaintiff, the investment community's understanding of the covenant was that it in some manner furnished "security for the bondholders and it protected the diversion of the earnings of the Port Authority into deficit mass rail transit." If the covenant is to be understood in that sense, the record supports plaintiff's claim that investors relied on the covenant in purchasing Authority bonds. But while reliance existed, the covenant cannot be said to have been the "primary consideration" for the purchases having been made, for no witness testified that purchases would *not* have been made without the covenant, but only that they would not have purchased or recommended the purchase of the bonds "at the price which they were then offered."

The limited role of the covenant on the Authority's credit standing is also reflected in the ratings assigned to Port Authority bonds by the principal rating services, Moody's and Standard and Poor's. Both have rated Authority bonds as "A" bonds, meaning that they are of investment quality and no default in payment of principal or interest is anticipated. The bonds carried the same rating prior to the enactment of the covenant, after it was enacted, after it was prospectively repealed, and after the repeal act of 1974. As suggested in the reports of the rating services, the rating assigned to Port Authority bonds is an amalgam of many factors, including not only the covenant but "the Authority's strong operating, financial and management record".[31]

Following the 1962 covenant legislation the Port Authority issued 20 series of bonds prior to the enactment of the prospective repeal which became effective on May 10, 1973. The interest rates on these bonds ranged from a low of 3-1/4% (20th series) to a high of 6-5/8% (35th series). After the prospective repeal was enacted, the Authority marketed

[31]As expressed by one of the witnesses, the Authority "has been well-run, well-organized, well-managed * * *. It's continually shown good revenues."

two additional bond issues, the 40th and 41st series, which carried interest rates of 6% and 5-1/2%, respectively. While it is claimed by plaintiff that the last two series of bonds are indirectly protected by the covenant until the "affected" bonds are retired in the year 2007, it is clear that the interest rates which the Authority has had to pay on non-affected bonds were not materially affected by the absence of direct covenant protection.

Plaintiff also attempted to show through its witnesses and exhibits that the repeal of the covenant adversely affected the secondary market for Authority bonds.[32] This conclusion was expressed by several witnesses who voiced the opinion that not only was the secondary market price of the bonds adversely affected, but that the nature of the market was altered in the sense that the market for the bonds became thin[33] and large institutional investors refused to purchase the bonds after repeal. There can be no question but that immediately following repeal and for a number of months thereafter the market price for Port Authority bonds was adversely affected. This was conclusively demonstrated by plaintiff's exhibits comparing the market price of selected Port Authority bonds, before and after repeal, with the prices of comparable bonds over the same period.

The problem presented by plaintiff's proofs, however, is that they do not show that the adverse effect attributable to the covenant repeal was permanent. Thus, immediately prior to repeal the price of Massachusetts Port Authority bonds was approximately two points higher than that quoted for New York - New Jersey Port Authority bonds having the same interest rate and a similar maturity.[34] The spread in

[32]The repeal became effective when the concurrent New York legislation was signed by Governor Malcolm Wilson on June 15, 1974.

[33]A "thin" market is one characterized by a low volume of trading in which the price structure of the market is subject to sharp fluctuation by relatively small buy or sell orders.

[34]The bonds prices referred to in the text are derived from Exhibits P–90 and S–3 and the trial transcript.

favor of "Mass Ports" fluctuated immediately after repeal but showed a market tendency to increase until it reached a maximum of 6-1/2 points on August 2. The spread continued to fluctuate thereafter and reached a maximum of 12 points by December 13, 1974. By January 3, 1975 the spread had narrowed to three points, and never exceeded four points through January 23, 1975. By the date of the trial the spread was reduced to two points, which is the same differential that existed prior to the effective date of the repeal.

Furthermore, beginning in August 1974 there were other factors which unquestionably contributed to the adverse price differential prevailing between Port Authority bonds and those of comparable issues. On August 15, 1974 the *Wall Street Journal* carried a story detailing the Authority's problems in completing and renting space in the World Trade Center. Then, on November 10, 1974, the *New York Times* ran a multi-column feature story with the headline "Port Authority Has Fallen on Hard Times." This story, like the one carried by the *Wall Street Journal* in August, referred to the Authority's difficulties at the World Trade Center and its losses on that project, estimated in the article to be as high as $25,000,000 a year.[35] The article also suggested that other Authority facilities which formerly had been profitable were breaking even or losing money. It is to be noted that Port Authority bonds suffered their sharpest decline for the whole period under review during the one month period following the *New York Times* article. On November 8, 1974 the bonds were quoted at 78, and by December 13, 1974 the price had dropped to 65.

The bottom line of plaintiff's proofs on this issue is simply that the evidence fails to demonstrate that the secondary market price of Authority bonds was adversely affected by the

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[35]The latest available figures disclose that the World Trade Center incurred a deficit for the year 1973 of $16,460,000.

repeal of the covenant, except for a short-term fall-off in price, the effect of which has now been dissipated insofar as it can be related to the enactment of the repeal

The Validity of the Repeal of the Covenant.

[2] Plaintiff's position here is premised on the proposition that the 1962 covenant legislation created a contract between the States of New Jersey and New York and the bondholders of the Port Authority which prohibited the use of Port Authority revenues and reserve funds for passenger railroad purposes except as expressly permitted by the terms of the act. The repeal act of 1974, it is said, impairs the obligation of that contract in violation of *U. S. Const.*, Art. I, § 10 of the United States ("No State shall * * * pass any * * * Law impairing the Obligation of Contract * * *") and *N. J. Const.* (1947), Art. IV, § VII, par. 3. ("The Legislature shall not pass any * * * law impairing the obligation of contracts * * *).[36]

[3] At the outset it is essential to define the terms of the contract and the nature of the impairment claimed by plaintiff. When the 1962 covenant was enacted there was in existence the CBR of 1952, pursuant to which the Authority had pledged its net revenues and the reserve funds as security

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[36]Plaintiff also urges that the repeal act contravenes the Fifth and Fourteenth Amendments of the United States Constitution and Article I, par. 20 of the New Jersey Constitution. The contention is that the repeal constituted a "taking" of property without due process of law, *i. e.*, just compensation. This issue will not be considered in this opinion for the following reasons: (1) to the extent that the claim is based upon an alleged reduction in the secondary market price of Authority bonds, it has been factually rejected *supra*, and (2) the test of constitutional validity as applied to repeal legislation is the same under the Contract and Due Process Clauses, *i. e.*, if an unlawful impairment has occurred there has been a "taking," and if not, then there is no taking. See *Veix v. Sixth Ward B. & L. Ass'n*, 310 *U. S.* 32, 41, 60 S. Ct. 792, 84 L. Ed. 1061 (1940); *Lynch v. United States*, 292 *U. S.* 571, 578–581, 54 S. Ct. 840, 78 L. Ed. 1434 (1934); Hale, "The Supreme Court and the Contract Clause: III," 57 *Harv. L. Rev.* 852, 890 (1944).

for the payment of debt service on all consolidated bonds. The CBR and the series' resolutions, pursuant to which all outstanding consolidated bonds were issued, constitute a contract between the bondholders and the Authority, and that contract was unaffected by the enactment of the 1962 covenant. The covenant superimposed upon the security provisions of the CBR and the series' resolutions the further agreement of the states that neither the Authority's revenues nor its reserve funds would be used for any additional passenger railroad facility whose estimated deficit would exceed 10% of the amount in the general reserve fund.[37] To the extent that the repeal of the covenant authorizes the Authority to assume greater deficits for such purposes, it permits a diminution of the pledged revenues and reserves and may be said to constitute an impairment of the states' contract with the bondholders.[38] *Bronson v. Kinzie,* 42 *U. S.* (1 *How.*) 311, 11 L. Ed. 143 (1843); *Planters' Bank of Miss. v. Sharp,* 47 *U. S.* (6 *How.*) 301, 327, 12 L. Ed. 447 (1848); *Hawthorne v. Calef,* 69 *U. S.* (2 *Wall.*) 10, 17 L. Ed. 776 (1864); *Von Hoffman v. City of Quincy,* 71 *U. S.* (4 *Wall.*) 535, 18 L. Ed. 403 (1867); *W. B. Worthen Co. v. Kavanaugh,* 295 *U. S.* 56, 55 S. Ct. 555, 79 L. Ed. 1298 (1935); *New Jersey Highway Authority v. Sills,* 109 *N. J. Super.* 424 (Ch. Div. 1970), supplemented 111 *N. J. Super.* 313 (Ch. Div.

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[37]The statutory formula for permitted deficits is set forth in more precise detail, *supra* at 162–163.

[38]It is not disputed by defendants that a legislative enactment, such as the 1962 covenant, may constitute a contract. Such has been the law since *Fletcher v. Peck,* 10 *U. S.* (6 Cranch.) 87, 3 L. Ed. 162 (1810). See also, *New Jersey v. Yard,* 95 *U. S.* 104, 114, 24 L. Ed. 352 (1877), where the court said: "It has become the established law of this Court that a legislative enactment * * * may contain provisions which * * * become contracts * * * within the protection of the [Contract Clause]." The legislative history associated with the enactment of the 1962 covenant as well as the statutory language used establish fairly conclusively that the Legislature intended the covenant to be a contract between the states and the bondholders of the Authority.

1970), aff'd 58 *N. J.* 432 (1971); *First Nat'l Bank of Boston v. Main Tpke. Auth.,* 153 *Me.* 131, 136 *A.* 2d 699 (Sup. Jud. Ct. 1957).

[4] The Contract Clause addresses itself not only to the obligation, but also to the remedy and the security furnished to enforce the obligation and assure its performance. The first expression of this view of the Contract Clause occurs in *Green v. Biddle,* 21 *U. S.* (8 *Wheat.*) 1, 5 L. Ed. 547 (1823), which arose out of a compact between Virginia and Kentucky creating the latter as a separate state. Under the terms of the compact Kentucky agreed that all private rights and land titles derived from the laws of Virginia would "remain valid and secure" under Kentucky law. Thereafter, Kentucky enacted a series of laws designed to diminish and impede the remedies available to Virginia claimants to recover possession and the rents and profits of lands occupied by Kentucky residents. In holding the legislation invalid under the Contract Clause, Justice Story said:

> It is no answer that acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." [21 *U. S.* (8 *Wheat.*) at 17].[39]

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[39]Upon rehearing in *Green v. Biddle,* Justice Washington delivered the opinion of the court containing perhaps the most extreme expression of the reach of the Contract Clause rendered by the court:

> The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however, minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. [21 *U. S.* (8 *Wheat.*) at 8488]

In contrast to the language of Justice Story quoted in the text above, Justice Washington states that *any* impairment, whether or not material to the obligation, violates the Contract Clause. It is

In *Von Hoffman v. City of Quincy, supra,* bonds were issued by a city under existing Illinois law which authorized a special property tax to be levied in an amount sufficient to pay the interest on the bonds. The taxes thus collected were to be held in a separate fund specially pledged for the payment of the interest and not to be used for any other purpose. Subsequently, the legislature enacted a statute which limited the rate of property tax that could be levied by municipalities, and repealed the prior law authorizing the levy of a special tax for the benefit of bondholders. The property taxes collected by the city under the new law were insufficient to pay the interest due on the bonds. A bondholder instituted suit against the city and judgment was entered in his favor for the amount of interest owed on the bonds. The city failed to pay the judgment and refused to levy a property tax for such purpose. The judgment creditor thereupon sought a writ of *mandamus* to compel the city to pay the judgment or to levy a special tax. In its defense the city relied upon the repeal legislation as constituting a valid exercise of the state's sovereign power with respect to future public revenues, as to which it urged no binding contract could exist.[40] The court held the repeal legislation to be an invalid impairment under the Contract Clause. The court reaffirmed the doctrine laid down by Justice Story in *Green v. Biddle, supra,* this time describing the prohibited area in terms of an impairment of "substantial" rights, rather than a "material" impairment.

It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy,

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doubtful whether this view was ever embraced by the court at any time. But see *Planters' Bank of Miss. v. Sharp,* 47 *U. S.* (6 *How.*) 301, 327, 12 L. Ed. 447 (1848); *Ogden v. Saunders,* 25 *U. S.* (12 *Wheat.*) 213, 256, 6 L. Ed. 606 (1827).

[40]The Supreme Court had earlier rejected this argument in a different context. See *New Jersey v. Wilson,* 11 *U. S.* (7 *Cranch.*) 164, 3 L. Ed. 303 (1812).

which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the Act is within the prohibition of the Constitution, and to that extent void. [71 *U. S.* at 553].

In its analysis of the issue presented the court viewed the question as addressing itself to the impairment of a remedy. However, the "remedy" in this context is actually the security furnished for the payment of the obligation, *i. e.,* the authorization to levy a special property tax to pay the interest on the bonds.

This line of authority culminates in *W. B. Worthen Co. v. Kavanaugh, supra,* one of the last adjudications by the Supreme Court declaring repeal or amendatory legislation invalid under the Contract Clause. In *Kavanaugh* bonds had been issued by a municipal improvement district organized under the laws of Arkansas. At the time of issuance the statutory scheme to secure payment of the bonds provided for mortgage benefit assessments to be made against each parcel of property which "contained provisions well planned to make these benefit assessments an acceptable security." 295 *U. S.* at 57, 55 S. Ct. at 555. Thereafter, the legislature amended the statute so as to modify the procedures relative to defaulted obligations. The interest and penalties payable on default were substantially reduced, the time in which the property was to be sold for nonpayment was extended from 65 days to 2½ years, and the property owner was permitted to remain in possession with a right of redemption for a further period of four years without accounting for rents. The court struck down the subsequent legislation under the Contract Clause and in the course of doing so it gave a more precise definition of what constitutes a prohibited impairment. Speaking for the court Justice Cardozo said:

In the books there is much talk about distinctions between changes of the substance of the contract and changes of the remedy. * * * The dividing line is at times obscure. There is no need for the

purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. * * * We state the outermost limits only. In stating them we do not exclude the possibility that the bounds are even narrower. The case does not call for definition more precise. A catalogue of the changes imposed upon this mortgage must lead to the conviction that the framers of the amendments have put restraint aside. With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor.

* * * * * * * *

Whether one or more of the changes effected by these statutes would be reasonable and valid if separated from the others, there is no occasion to consider. A state is free to regulate the procedure in its courts even with reference to contracts already made * * * and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up as to make the remedy a shadow. * * * What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security. [295 *U. S.* at 60, 62, 55 S. Ct. at 557].

[5, 6] As the language of the court in the cases cited above makes manifest, not every impairment of a contract obligation or security for its performance runs afoul of the Contract Clause; a state acting under its reserved police powers may alter its remedial processes and thereby diminish contractual security provided it does not destroy its quality as "an acceptable investment for a rational investor." This view of the Contract Clause has its origin in the concurring opinion of Justice Johnson in *Fletcher v. Peck,* 10 *U. S.* (6 *Cranch*) 87, 145, 3 *L. Ed.* 162 (1810). See *Hale, supra* at 873. Justice Johnson's conception of the states' reserved power under the Contract Clause was cogently expressed in his dissenting opinion in *Ogden v. Saunders,* 25 *U. S.* (12 *Wheat.*) 213, 6 L. Ed. 606 (1827), where he said:

Societies exercise a positive control as well over the inception, construction, and fulfillment of contracts, as over the form and measure of the remedy to enforce them.

* * * * * * * *

It is, therefore, far from being true, as a general proposition, "that a government necessarily violates the obligation of a contract which it puts an end to without performance." It is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts. [25 *U. S.* (12 *Wheat.*) at 286, 291.]

[7] Justice Johnson's formulation of the police power doctrine as applied to the Contract Clause was quoted with approval and forms the rationale for the court's decision in *Home B. & L. Ass'n v. Blaisdell,* 290 *U. S.* 398, 428-429, 54 S. Ct. 231, 78 L. Ed. 413 (1933). During the span of more than a century between *Ogden v. Saunders* and *Blaisdell* the court had held on numerous occasions that the states retained the power to impair contractual obligations — including those to which the state was a party — in the exercise of their always reserved police powers to act in the interest of the public health, safety and general welfare.[41] First in dictum, *Boyd v. Alabama,* 94 *U. S.* 645, 650, 24 L. Ed. 302 (1877), and then by direct application of the doctrine, the court held that a lottery franchise granted for a definite term of years could be repealed. *Stone v. Mississippi,* 101 *U. S.* 814, 25 L. Ed. 1079 (1880); *Douglas v. Kentucky,* 168 *U. S.* 488, 18 S. Ct. 199, 42 L. Ed. 553 (1897). In *Northwestern Fertilizing Co. v. Hyde Park,* 97 *U. S.* 659, 24 L. Ed. 1036 (1878), it was held that a franchise to operate a fertilizer factory at a given location could be negated by the exercise of the police power to abate a nuisance. Similarly, the power to control the use of the public streets may not be bargained away, *Atlantic Coast Line R. Co. v. Goldsboro,* 232 *U. S.* 548, 34

[41] For a more detailed discussion of the development of the doctrine, see *Wright, The Contract Clause and the Constitution,* 196-213 (1938).

S. Ct. 364, 58 L. Ed. 721 (1914); *Denver & Rio Grande R. Co. v. Denver,* 250 *U. S.* 241, 39 S. Ct. 450, 63 L. Ed. 958 (1919), nor can the state contractually bind itself not to exercise its power of eminent domain, *West River Bridge Co. v. Dix,* 47 *U. S.* (6 How.) 507, 12 L. Ed. 535 (1848); *Pennsylvania Hospital v. Philadelphia,* 245 *U. S.* 20, 38 S. Ct. 35, 62 L. Ed. 124 (1917), or to change the location of its governmental subdivisions, *Newton v. Mahoning County,* 100 *U. S.* 548, 25 L. Ed. 710 (1880). The broadest expression of this view of the police power during this period is to be found in *Chicago & Alton R. R. v. Tranbarger,* 238 *U. S.* 67, 35 S. Ct. 678, 59 L. Ed. 1204 (1915), where Justice Pitney said:

> It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution [the Contract and Due Process Clauses] has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise * * *. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of public health, morals or safety. [238 *U. S.* at 76–77, 35 S. Ct. at 682]

The issue before the court in *Blaisdell* was the validity of the Minnesota Mortgage Moratorium Law. Once again the question was whether the state could exercise its sovereign power to impair the security provisions for the payment of a debt by a significant alteration of the remedies available for its enforcement. The act provided that during the economic emergency declared to exist, the state courts could upon application and notice extend the period of redemption from foreclosure sales and fix the rental value to be paid by the mortgagor in possession. The act also barred any action for a deficiency judgment until after the expiration of the redemption period. The court upheld the constitutionality of the act, and Chief Justice Charles Evans Hughes described the reach of the Contract Clause:

> To ascertain the scope of the constitutional prohibition, we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.
>
> * * * * * * * *
>
> Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." *Stephenson v. Binford,* 287 *U. S.* 251, 276, 53 *S. Ct.* 181, 189, 77 *L. Ed.* 288. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, — a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court. [290 *U. S.* at 428, 434–5, 54 S. Ct. at 236]

[8–10] The line of demarcation between *Blaisdell* and *Kavanaugh* may be expressed as one of degree: The states' inherent power to protect the public welfare may be validly exercised under the Contract Clause even if it impairs a contractual obligation so long as it does not destroy it. While Blaisdell placed great emphasis upon the emergency character of the Minnesota law to validate the action taken, decisions of the court since then have sanctioned nonemergent legislation impairing contractual rights and remedies where necessary to protect the economic well being of the state. See *Veix v. Sixth Ward B. & L. Ass'n of Newark,* 310 *U. S.* 32, 60 S. Ct. 792, 84 L. Ed. 1061 (1940); *Gelfert v. National City Bank,* 313 *U. S.* 221, 61 S. Ct. 898, 85 L. Ed. 1299 (1941). Furthermore, in keeping with the principles set forth in *Kavanaugh,* we must deal with realities and not abstractions, for "[t]he Constitution is 'in-

tended to preserve practical and substantial rights, not to maintain theories.'" *Faitoute Iron & Steel Co. v. City of Asbury Park,* 316 *U. S.* 502, 514, 62 S. Ct. 1129, 1133, 86 L. Ed. 1629 (1942).

The most recent case dealing with the issue, and that upon which defendants place greatest reliance, is *City of El Paso v. Simmons,* 379 *U. S.* 497, 85 S. Ct. 577, 13 L. Ed. 2d 446, reh. den. 380 *U. S.* 926, 85 S. Ct. 879, 13 L. Ed. 2d 813 (1965). The facts of the case may be briefly summarized. Texas law had provided for the sale of public lands on easy credit terms to raise money for school funds and to encourage land settlement. The credit terms set forth in the law governing such sales included a provision permitting the contract owner, were the land forfeited back to the State for nonpayment of interest, an unlimited time in which to reinstate the contract by payment of back interest, subject only to the rights of intervening third persons. In 1941, after a history of land title disputes and rampant speculation in such lands, Texas limited the right of reinstatement to five years. Upon expiration of this five-year period the State would have clear title. Simmons, owner of a quitclaim deed to land contracted for in 1910, had not made timely payment of the interest arrearages. His contract title was forfeited by the state which subsequently transferred the land to the City of El Paso. He instituted suit against the city to determine title to the land, urging that the 1941 law was a violation of the Contract Clause since it not only impaired his contractual right of reinstatement but destroyed it completely.

The 1941 legislation was held by the court to constitute a valid exercise of the state's power to modify or affect the obligation of its contracts. The essential question, in the court's view, was not whether the statute impaired the "obligation" or the "remedy", for not "every modification of a contractual promise * * * [or] every alteration of existing remedies * * * violates the Contract Clause." 379

U. S. at 506–507, 85 S. Ct. at 582. Rather, the question was whether the modification of the contractual obligation to reinstate the purchaser's title was reasonable on the facts disclosed. Citing the legislative history, the court noted that Texas had a vital interest in "the integrity of land titles" and in the administration "of its property in a businesslike manner" (379 *U. S.* at 511–12, 85 S. Ct. at 585) and

> * * * [t]he Contract Clause of the Constitution does not render Texas powerless to take effective and necessary measures to deal with [these matters]. * * * [T]he promise of reinstatement, whether deemed remedial or substantive, was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking. * * * We do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of a defensible [*sic*] right to reinstatement in case of his failure to perform * * *. We, like the Court in *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 *U. S.* 502, 514, 62 *S. Ct.* 1129, 1135, 86 *L. Ed.* 1629, believe that "[t]he Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' * * *." 379 *U. S.* at 513–515, 85 S. Ct. at 586.
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> The measure taken to induce defaulting purchasers to comply with their contracts * * * was a mild one, indeed, hardly burdensome to the purchaser who wanted to adhere to his contract of purchase, but nonetheless an important one to the State's interest. The Contract Clause does not forbid such a measure. [379 *U. S.* at 516–517, 85 S. Ct. at 588]

The view of the Contract Clause and its subservience to the police power as expressed in *Blaisdell* and *El Paso* coincides with the interpretation placed upon the Contract Clause of the New Jersey Constitution as interpreted by our highest courts. Thus, in *Hourigan v. North Bergen Tp.,* 113 *N. J. L.* 143 (E. & A. 1934), Justice Heher cited *Blaisdell* with approval for the proposition that "the reservation of essential attributes of sovereign power" is to be read into the contracts of the State. He there defined the police power as

> * * * an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people and [it] is paramount to any rights under contracts between individuals. While this power is subject to limitations in certain cases, there is a wide discretion on the part of the legislature in determining what is and what is not necessary — a discretion which courts ordinarily will not interfere with. [at 149]

[11] Neither *New Jersey Highway Auth. v. Sills, supra,* nor *New Jersey Sports & Expos. Auth. v. McCrane,* 61 *N. J.* 1 (1972), app. dism. 409 *U. S.* 943, 93 S. Ct. 270, 34 L. Ed. 2d 215 (1972), suggests that our present Supreme Court has adopted a narrower interpretation of the Contract Clause of either the State or the Federal Constitutions. In *Sills* the court viewed a statute exempting National Guardsmen from the payment of tolls on the Parkway as "ordinary and relatively unimportant legislation" not intended to deal with "any problem of state-wide importance" as was the case in *El Paso* (111 *N. J. Super.* at 320). And in *McCrane* the Supreme Court expressly affirmed that while a contract between the State and the bondholders of an independent governmental authority is entitled to protection under the State and Federal Constitutions, such contracts are nevertheless subject to "a proper exercise of the State's never abdicated police powers." 61 *N. J.* at 26.[42]

[12] The history of the creation and evolution of the Port Authority establishes beyond peradventure that it was intended by the states and by the Congress to perform govern-

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[42] In their brief and at oral argument defendants ask the court to pass upon the validity of the New York repeal act under the New York Constitution. While it would unquestionably be desirable to do so in the interest of resolving all issues within the context of this litigation, that question should be left to the New York courts for decision. *Cf. Interstate Wrecking Co. v. Palisades Interstate Park Comm'n,* 57 *N. J.* 342, 352 (1971). It may be noted that U. S. Trust has filed a declaratory judgment action in the New York Supreme Court which is presently pending.

mental functions necessary and vital to the public safety, health and welfare of the citizens of the two states and the nation as well. *Cf. Comm'r of Int. Rev. v. Ten Eyck,* 76 *F.* 2d 515, 518 (2 Cir. 1935). The states have a continuing interest in and can never abdicate their sovereign powers to control and direct the activities of the Authority to meet the everchanging needs of a complex society. See *Blaisdell, supra,* 290 U. S. at 442, 54 S. Ct. 231. Senator Farley summed it up when he advised Commissioner Kellogg in 1961:

> * * * I appreciate that if the Legislature directs you to enter into a contract involving the issuance of bonds, there will be no impairment of obligations of contract, but I must call to your attention and the members of your Commission that one Legislature cannot bind a subsequent Legislature involving policy. If, perchance, may I illustrate — ten, fifteen, twenty years from now the respective legislatures of New York and New Jersey importune your Port Authority Commission to do something in addition involving public service, one legislature cannot bind another involving policy. [*Supra* at 157]

The interest of the states in the development of a coordinated system of public and private transportation within the Port District has been spread on the public record for more than 50 years, and legislative action to accomplish that objective clearly involves an exercise by the states of their fundamental sovereign powers. The enactment of the 1962 covenant was indeed an attempt to satisfy an immediate public need to preserve the H&M as a viable public transportation system. The passage of time and events between 1962 and 1974 satisfied the Legislatures of the two states that the public interest which the Port Authority was intended to serve could not be met within the terms of the covenant.

[13, 14] The events which occurred between the passage of the covenant and its repeal are described elsewhere in this opinion (*supra* at 167–176) and need not be detailed again. Suffice it to say that between 1962 and 1974 the security afforded bondholders had been substantially augmented by a vast increase in Authority revenues and reserves, and the Authority's financial ability to absorb greater deficits, from

whatever source and without any significant impairment of bondholder security, was correspondingly increased.[43] During the same interval mass transit facilities within the District continued to deteriorate while the public need for such facilities became unprecedented as the result of the promulgation of stringent federal air pollution regulations designed to reduce automobile usage and the emergence of an energy crisis which threatened the entire system of private automobile transportation in the two States.[44]

"The motive, the policy [and] the object" of the repeal legislation, read against its background, was to further a vital interest of the states which their Legislatures deemed to be essential to the public good. The question is whether the exercise of such power falls within the prohibited scope fo the Contract Clause, or does it, in the language of Chief Justice Hughes in *Blaisdell,* represent "a rational compromise between the individual rights and the public welfare." 290 *U. S.* at 442, 54 S. Ct. at 241.

Conceding the existence of some impairment of bondholder security as a result of the repeal, has the action of

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[43]Between 1961 and 1973 the net revenues of the Authority increased from $68,000,000 to $137,000,000, and over that period the Authority had available to it $582,732,000 in excess of its debt service requirements, after taking into account the deficits of the H&M. Through 1974, the corresponding figures are $161,283,000 and $649,750,000, respectively.

[44]Plaintiff urges that none of the legislative history (detailed at 167–176, *supra*) which preceded the repeal of the covenant should be considered relevant to the question of whether the repeal constituted a reasonable exercise of the states' police powers inasmuch as the repeal legislation was unnecessary and the Legislature made no findings or declarations with respect to such matters. A judgment as to the necessity of the legislation is for the Legislature and not the courts. See *Hourigan v. North Bergen Tp., supra* 113 *N. J. L.* at 149. Nor is the Legislature required to make explicit findings and declarations within the context of the legislation to support an exercise of the police power. See *Gelfert v. Nat'l. City Bank of N. Y., supra* 313 *U. S.* at 235, 61 S. Ct. 898; *Bucsi v. Longworth B. & L. Ass'n,* 119 *N. J. L.* 120, 122 (E. & A. 1937), app. dism. 305 *U. S.* 665, 59 S. Ct. 154, 83 L. Ed. 431 (1938).

the states destroyed the quality of their security as an "acceptable investment for a rational investor"? The repeal, of course, leaves intact the provisions of the CBR and the series resolutions which now constitute, together with the General Reserve Fund Act, the same measure of the bondholders' contractual security rights as existed prior to the enactment of the covenant in 1962. Presumably, rational investors—including plaintiff—purchased hundreds of millions of dollars of consolidated bonds prior to 1962, without the additional security afforded by the covenant and with full knowledge of the power of the states to direct the Authority into mass transit operations. The two principal bond rating services, upon whose judgment the financial community places great reliance, rated the consolidated bonds—minus the covenant—as securities as to which no default was anticipated.

The claim that bondholder security has been materially impaired or destroyed by the repeal is simply not supported by the record. The pledge of the Authority's net revenues and reserves remains intact; the Authority will still be barred from the issuance of any new consolidated bonds unless the 1.3 test required by the CBR is met, and the Authority will continue to be prohibited from the issuance of any consolidated bonds or other bonds secured by a pledge of the general reserve fund without the certification required by section 7 of the series resolutions, to wit, that in the opinion of the Authority the estimated expenditures in connection with any additional facility for which such bonds are to be issued would not, for the ensuing ten years, impair the sound credit standing of the Authority, the investment status of its consolidated bonds, or the Authority's obligations to its consolidated bondholders.

[15] Plaintiff's claim of an unconstitutional impairment is predicated upon such slender reeds as the assertion that the "quality" of the certification required under the CBR and section 7 need not be as "objective" as that required under the covenant; the speculation that the good judgment of the Authority's commissioners in making the necessary

certifications will be overborn by the "political pressures" exerted by the Governors of the States,[45] and the self-flagellating prospect that the states will conspire to "give" the New York City subway system to the Authority and thereby destroy not only the bondholders' security but the Port Authority as well. But as the court stressed in *Faitoute, supra,* constitutional questions must be decided in the world of reality and not by resort to abstract speculations of the kind offered by plaintiff.

[16, 17] The thrust of plaintiff's argument is that any impairment of the security provisions of a contract violates the Contract Clause. It seeks to recreate a theory of the Contract Clause which, if ever imbedded in our constitutional law, no longer exists. As reflected in the course of more than 150 years of its judicial interpretation, the Contract Clause must be construed in harmony with the power of the states to alter or modify their contractual obligations where an important public interest requires. Those who enter into contractual relations with the sovereign, including the bondholders of the Port Authority, are chargeable with the knowledge that it is a sovereign entity with which they are dealing and that "the reservation of [the] essential attributes of sovereign power" is as much a part of their contract as that which is expressly stated.

[18] It is the judgment of this court that the repeal legislation was a reasonable and hence valid exercise of the states' police power which is not prohibited by the Contract Clause of either the Federal or the State Constitution. An order will therefore be entered dismissing the complaint of plaintiff and in favor of defendants on so much of their counterclaim as seeks a declaratory judgment with respect to the constitutional validity of *chapter* 25 of the *Laws of* 1974.

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[45]At the same time plaintiff argues that the covenant's requirement of a certification by the Governors is an "added" protection afforded them by the covenant.

In view of the court's holding in the U. S. Trust action, defendant's third separate defense (asserting the invalidity of the 1962 covenant) and the complaint in the *Gaby* action will be dismissed. See *Wagner v. Ligham,* 37 *N. J. Super.* 430 (App. Div. 1955).

Judgment

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION — BERGEN COUNTY

UNITED STATES TRUST COMPANY OF NEW YORK, etc.,
Plaintiff,

v.

THE STATE OF NEW JERSEY, et als.,
Defendants.

DANIEL M. GABY,
Plaintiff,

v.

THE PORT OF NEW YORK AUTHORITY, et al.,
Defendants.

THE COURT having rendered its written opinion on May 14, 1975, it is, for the reasons stated therein,

ORDERED, ADJUDGED and DECREED:

1. The complaint in *United States Trust Company of New York, etc.* v. *The State of New Jersey, et als.*, Docket No. L-26861-73 ("the U.S. Trust action"), is hereby dismissed;

2. Judgment is hereby entered in favor of the defendants in the U.S. Trust action on so much of their counterclaim as seeks a declaratory judgment with respect to the constitutional validity of chapter 25 of the Laws of New Jersey 1974;

Judgment

3. Chapter 25 of the Laws of New Jersey 1974 is hereby declared valid and constitutional in all respects;

4. In view of the Court's holding in the U.S. Trust action, the defendants' third separate defense in that action and the complaint in *Daniel M. Gaby* v. *The Port of New York Authority,* Docket No. L-26462-71, are hereby dismissed.

Dated: May 29, 1975.

GEORGE B. GELMAN,
J.S.C.

[Consents to form omitted in printing.]

Decision of the Supreme Court of New Jersey

UNITED STATES TRUST COMPANY OF NEW YORK, AS TRUSTEE FOR THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY CONSOLIDATED BONDS, FORTIETH AND FORTY-FIRST SERIES; ON ITS OWN BEHALF AND ON BEHALF OF ALL HOLDERS OF CONSOLIDATED BONDS OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLANT-CROSS-RESPONDENT, v. THE STATE OF NEW JERSEY; BRENDAN T. BYRNE, GOVERNOR OF THE STATE OF NEW JERSEY; AND WILLIAM F. HYLAND, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

DANIEL M. GABY, PLAINTIFF-CROSS-APPELLANT, v. THE PORT OF NEW YORK AUTHORITY, JAMES C. KELLOGG, III, HOYT AMMIDON, GUSTAVE L. LEVY, JAMES G. HELLMUTH, ANDREW C. AXTELL, WILLIAM J. RONAN, W. PAUL STILLMAN, WALTER H. JONES, BERNARD J. LASKER, PHILIP B. HOFFMAN, AND JERRY FINKELSTEIN, COMMISSIONERS OF THE PORT OF NEW YORK AUTHORITY, AUSTIN J. TOBIN, EXECUTIVE DIRECTOR OF THE PORT OF NEW YORK AUTHORITY, AND WILLIAM T. CAHILL, GOVERNOR OF THE STATE OF NEW JERSEY, DEFENDANTS-CROSS-RESPONDENTS, AND UNITED STATES TRUST COMPANY OF NEW YORK, ETC., INTERVENOR.

Argued October 7, 1975—Decided February 25, 1976.

SYNOPSIS

Class action on behalf of citizens, residents and taxpayers whose occupations were dependent upon the existence of mass transportation was brought against Port Authority of New York and New Jersey challenging constitutionality of covenant between the States of New Jersey and New York on one hand and the holders of bonds issued by the Port Authority on the other hand with respect to the use to which certain revenues were to be put. After the covenant was repealed by New Jersey Legislature, trustee for the bonds brought action challenging the constitutionality of the repealing statute. The Superior Court, Law Division, 134 *N. J. Super.* 124, upheld the constitutionality of the repealer and dismissed the class action and the parties appealed. The Supreme Court held that compact which created the Port Authority empowered, but did not mandate, the Authority to develop a plan for a particular kind of method of transportation; and that, since the Authority had exercised its discretion by rejecting a policy favoring mass transportation, mandamus did not lie to compel the Authority to develop a plan for mass transit even though, by virtue of repeal of the covenant, it had the funds to do so.

Affirmed.

Pashman, J., concurred in part and dissented in part and filed an opinion.

Mr. Robert B. Meyner and *Mr. Devereux Milburn*, of the New York bar, argued the cause for appellant-cross-respondent-intervenor United States Trust Company (*Messrs. Meyner, Landis and Verdon*, and *Messrs. Carter, Ledyard and Milburn* and *Hawkins, Delafield and Wood*, of the New York bar, attorneys; *Mr. Meyner, Mr. Milburn*, and *Mr. Donald J. Robinson*, of the New York bar, on the brief and of counsel).

Mr. Murray J. Laulicht and *Mr. Michael I. Sovern*, of the New York bar, Special Counsel to the Attorney General, argued the cause for respondents-cross-appellants State of New Jersey, Brendan T. Byrne and William F. Hyland (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Laulicht, Mr. Sovern* and *Mr. Harold Edgar*, of the New York bar, Special Counsel to the Attorney General, on the brief).

Mr. Howard Stern argued the cause for plaintiff-cross-appellant Daniel M. Gaby (*Messrs. Shavick, Stern, Schotz, Steiger and Croland*, attorneys; *Mr. Stern* on the brief. *Mr. Stern* and *Mr. Theodore W. Kheel* of the New York bar and *Messrs. Battle, Fowler, Stokes and Kheel* of the New York bar, of counsel).

Mr. Francis A. Mulhern argued the cause for cross-respondent The Port Authority of New York and New Jersey, et al. (*Mr. Mulhern*, attorney and on the brief; *Mr. Patrick J. Falvey* of the New York bar, *Mr. Joseph Lesser* of the New York bar, *Ms. Isobel E. Muirhead, Mr. Arthur P. Berg* of the New York bar, and *Mr. Vigdor D. Bernstein*, of counsel).

PER CURIAM. The judgment is affirmed, substantially for the reasons set forth in the opinion of Judge Gelman, 134 *N. J. Super.* 124 (Law Div. 1975). The observations which follow are occasioned by Justice Pashman's suggested remedy in the Gaby suit.[1]

Whatever persuasive force might be accorded the argument that as a matter of policy the Port Authority should devote more of its energies and resources to the mass transit field, the fact remains that the remedy fashioned by our Brother is neither pressed for by Gaby on this appeal nor within the powers of this Court to direct and enforce.

Gaby's class action complaint for a declaratory judgment that the 1962 Covenant was unconstitutional asked for "multifarious relief," including a request that the Port Authority be directed "to formulate and submit to the court a plan for the development of mass transit facilities within the Port District," 134 *N. J. Super.* at 131. However, the trial judge, having concluded in the *United States Trust Co.* suit that "the repeal legislation was a reasonable and hence valid exercise of the states' police power which is not prohibited by the Contract Clause of either the Federal or the State Constitution," *id.* at 197, found it unnecessary to reach the issue of the 1962 Covenant's asserted invalidity. He therefore dis-

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[1]Justice Pashman would order the Port Authority to complete pending projects and to "formulate and present plans and suggestions for a regional mass transportation scheme to the Legislatures of New York and New Jersey * * * in an expeditious fashion and within a fixed period of time." *Post* at 288.

missed Gaby's complaint, *id.* at 198, without discussing the requested relief of a direction for development of a mass transit plan, on which issue there was neither testimony nor argument at the trial level.

In his brief filed in the Court after direct certification of his appeal, 68 *N. J.* 175 (1975), Gaby conceded his limited purpose in pursuing the appeal as being "to preserve the issue of the constitutionality of the 1962 Covenant." The point of this in turn was, as he put it, to furnish "an alternative ground for affirming the decision below."[2] Whatever issues may have been preserved by his appeal and whatever desire there may have been to present "all the issues," the fact remains that Gaby's brief raises and discusses only the validity of the Covenant in constitutional terms. No argument is made there for any special relief; and, understandably, the Port Authority has likewise not briefed the question at all in this Court. At oral argument the subject was adverted to only in a limited fashion.

Ordinarily, we would have no occasion to decide an issue which, while portentous in itself, has become so remote and peripheral to the central thrust of this litigation. However, inasmuch as the minority opinion raises and discusses *in extenso* this question of considerable public significance, namely, the involvement of the Port Authority in mass transit and particularly the propriety of this Court ordering as a specific remedy the submission of a plan for development of mass transit facilities, we overlook whatever infirmities may exist in the record before us, compounded by the practical disadvantage of not having the views of the parties, and proceed to address the point.

[1] The 1921 Compact between the States of New York and New Jersey, whereby the Port Authority was created, *N. J. S. A.* 32:1–4, envisioned the adoption of a Comprehensive Plan for the development of the port. *N. J. S. A.*

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[2]Cross Motion for Certification of Plaintiff-Respondent, Daniel M. Gaby.

32:1–11. Direction was given to the Port Authority in the Plan itself "to proceed with the development of the port of New York in accordance with said comprehensive plan * * *." *N. J. S. A.* 32:1–33. That the Authority's involvement in transportation matters was contemplated is obvious from a reading of this and other portions of the Comprehensive Plan as well as of the Compact; but it requires a quantum leap to derive therefrom a mandate (as distinguished from the power) to develop a plan for a particular kind or method of transportation, to wit, mass transit. It is not without significance, for instance, that the legislature has provided that the Authority *may* make recommendations for the increase and improvement of transportation facilities, *N. J. S. A.* 32:1–13, which by definition includes railroads and any facility for the "transportation or carriage of persons or property," *N. J. S. A.* 32:1–23; but nowhere is it mandated that such recommendations be made. A mandate such as that contemplated by the minority opinion is not something to be inferred by the courts but rather is a singularly appropriate subject for specific legislative directive, conspicuously absent here. *Cf. Del. Riv. & Bay Auth. v. N. J. Pub. Emp. Rel. Comm'n.*, 112 *N. J. Super.* 160, 165 (App. Div. 1970), aff'd o. b., 58 *N. J.* 388 (1971).

If, then, the Authority is in the position of being empowered (as we acknowledge) rather than mandated to act in the area of mass transit, its exercise of that power becomes a matter of discretion and judgment. As is made abundantly clear by the voluminous record in this case, the trial court's opinion, and the concurring and partially dissenting opinion here, the Authority has more than once in recent years broached the question of whether it should pursue a policy of encouraging mass transit and has determined that it shall not. The remedy suggested in the minority opinion is designed to overrule that decision. As such it is in the nature of the former prerogative writ of *mandamus*, now invocable under proceedings for relief in lieu of prerogative writs, *Rule* 4:69.

[2, 3] However, *mandamus* will not lie if the duty to act is a discretionary one and the discretion has been exercised. As Justice Heher explained, in *Switz v. Middletown Twp.*, 23 *N. J.* 580 (1957), *mandamus* is "a coercive process that commands the performance of a specific ministerial act or duty, or compels the exercise of a discretionary function, but does not seek to interfere with or control the mode and manner of its exercise or to influence or direct a particular result." 23 *N. J.* at 587. As we have sought to demonstrate, the circumstances before us do not at all invite or accommodate the remedy proposed. This is so because the Authority (whose function is clearly not ministerial) has in fact exercised its discretion, even though that exercise has resulted in the rejection of a policy favoring mass transportation. Being a judgment decision its wisdom may be open to dispute; but as to the propriety of this Court's refusal to intrude on the underlying policy determination, there can be no question in the circumstances before us. And this not as a response to some procedural deficiency but because of our respect for the fundamental substantive principle embodied in *mandamus*.

Finally, we observe that in this particular area of bi-state operations, there is close and continuing supervision of the Port Authority by the other branches of government. Hence, the proposed remedy would not only tend to usurp the influence over the Authority vested in the Governors of the States of New York and New Jersey, but would also intrude upon the functions of the legislatures of the respective States, whose task it is in the final analysis to enact appropriate legislation and take such other action as may be required to remedy whatever deficiencies may exist with respect to mass transit.

Affirmed.

PASHMAN, J. (concurring in part and dissenting in part).

I

INTRODUCTION TO GABY COMPLAINT

My Brothers today affirm a lower court decision which was the product of two separate and distinct actions consolidated for trial. *United States Trust Co. v. State*, 134 *N. J. Super.* 124 (Law Div. 1975). In the first action, brought by plaintiff United States Trust Company, the trial court sustained the State's repeal of the 1962 statutory covenant (*N. J. S. A.* 32:1–35.55) between the States of New Jersey and New York and the holders of bonds issued by the Port Authority of New York and New Jersey (Port Authority). That covenant was concurrently enacted by the legislatures of New York and New Jersey at the time of the Port Authority's acquisition of the Hudson & Manhattan Railroad Company (H & M), since renamed the Port Authority Trans-Hudson System (PATH). Intended as a means of protecting the bondholders' investments, the covenant prohibited the states and the Port Authority from applying "any of the rentals, tolls, fares, fees, charges, revenues or reserves, . . . for any railroad purposes whatsoever other than permitted purposes." *N. J. S. A.* 32:1–35.55. As subsequently defined in the covenant, "permitted purposes" precluded the establishment, acquisition or construction of any railroad facility until the Port Authority could determine that the facility would be self-supporting or would not produce deficits except within narrowly defined limits.

In dismissing plaintiff's cause of action, the trial court found that the 1974 "repealer," *N. J. S. A.* 32:1–35.55a, was immune from constitutional challenge as an impairment of contractual obligation, a right which is protected by *U. S. Const.*, Art. I, § X and *N. J. Const.* (1947), Art. IV, § VII, ¶ 3. As a collateral finding, the court determined that the attractiveness of Port Authority bonds was not contingent upon the continued protection of the 1962 covenant, but rather upon the viability of the Port Authority itself.

The majority affirms the trial court on these bases and to this extent, I concur fully and completely with the conclusions reached by Judge Gelman in his very enlightened and comprehensive opinion. My agreement is premised on the unduly restrictive influence which the covenant exerted on Port Authority operations in contravention of the statutory mandates upon which that agency was created in 1921. The paralytic effect of the covenant could be seen in the Authority's practical inability and attitudinal reluctance to respond to the mounting needs for rapid transit in the New York metropolitan area. In light of the limited utility which it continued to serve, the 1962 covenant represented an artificial obstacle to the affirmative public action which was necessitated as an alternative to continued and wasteful reliance solely on the private automobile as the primary mode of transportation.

The second action, *Gaby v. Port of New York Authority, et al.*, was likewise concerned with the repeal of the 1962 covenant. Expanded into a class action on behalf of citizens, residents and taxpayers whose occupations are dependent upon the existence of mass transportation, plaintiff cites the 1962 covenant as an impediment to the improvement and expansion of these facilities. While the State of New Jersey sought the repeal of the covenant as an ultimate end in the *United States Trust Co.* action, plaintiff Gaby visualizes a repeal as merely a means to a larger end. This is because the vindication of Gaby's interests is only partially dependent on freeing the financial resources from the restrictions of the 1962 covenant and placing them at the Port Authority's disposal. More problematical and essential to the relief which he desires is the necessity to overcome the administrative inertia which has characterized the agency's efforts in the area of mass transportation. Consequently, Gaby requested in his complaint that the trial court:

> **[D]irect and order the Port Authority, its Commissioners, and its Executive Director to formulate and submit to this Court, or a Special Master to be appointed by this Court, a plan for the development of mass transportation facilities in the Port District. [Plaintiff Gaby's complaint at 17]**

This action was pretried on February 22, 1973 and oral arguments were heard on September 26, 1973 on the parties' respective motions for summary judgment. Judgment was deferred and arguments were later rescheduled to permit the submission of briefs on additional issues and the intervention of United States Trust Company as a party defendant representing the interests of Port Authority bondholders. Prior to these arguments, the pendency of legislation repealing the covenant recommended that the trial court withhold further review. Accordingly, the proceedings were stayed to permit consideration of the anticipated legislation.

The statutory repealer which was signed into law by Governor Brendan T. Byrne on April 30, 1974 precipitated the *United States Trust Co.* action, which was instituted on the same day. On the basis of common subject matter, this later action was consolidated on December 10, 1974 with the previously filed *Gaby* case by order of the trial court. These matters then proceeded to trial in February 1975.

The trial was largely confined to the factual issues of bondholder reliance on the 1962 covenant and resultant damage to the secondary bond market caused by the repeal of the covenant. The information which was thus elicited formed the basis for the trial court's reported opinion, 134 *N. J. Super.* 124, in which the constitutionality of the 1974 repealer was sustained. Although reasons upon which the court's decision was grounded were clearly distinguishable from the constitutional arguments advanced by Gaby, the court's ultimate decision — the rejection of the 1962 covenant — coincided with Gaby's interests. Regardless of whether that result was achieved by sustaining the 1974 repealer as the trial court did, or whether it was achieved by finding the 1962 covenant itself unconstitutional as suggested by Gaby, the result indicated the possibility of granting the further relief sought by Gaby. A more activist role

for the Port Authority appeared to be a reality. Nonetheless, the court concurrently ordered the dismissal of Gaby's complaint, thus frustrating the additional relief which he sought. 134 *N. J. Super.* at 198. From this disposition, Gaby filed a cross-motion for direct certification which was granted on May 28, 1975. 68 *N. J.* 175 (1975).

Similar to his presentation before the trial court, Gaby's arguments are again directed towards a declaration of the unconstitutionality of the 1962 covenant. This is more the result of strategic considerations, however, than devotion to substantive principle. Recognizing the limited nature of the trial court's factual findings and disposition, Gaby has taken what appears to be a most advisable legal course. By preserving the issue of the constitutionality of the 1962 covenant on appeal, he has simultaneously preserved one of his major contentions should this or any other court reverse the trial court on the constitutionality of the 1974 repealer.

Furthermore, in his Supreme Court brief, Gaby explained that his contentions with regard to the 1962 Covenant are inextricably tied to his request for greater involvement of the Port Authority in mass transit projects:

> **The Appellant's Brief of Gaby is concerned with the validity of the 1962 Covenant (*N. J. S. A.* 32:1–35.50 *et seq.*). Central to the issue of the validity of the Covenant is the question whether the mass transportation of people within the Port District was one of the principal activities authorized by the Compact (*N. J. S. A.* 32:1–35.50 et seq.); whether the insulation of the Port Authority from that activity was in such derogation of the Compact as to frustrate its meaning and intent and so material as to require Congressional approval. [Plaintiff-Cross Appellant's brief at 3].**

The majority today chooses to overlook this relationship in its reluctance to transcend the judgmental confines of the trial court and in its affirmation of that court's dismissal of Gaby's complaint. This disposition, undertaken in an unusually cavalier fashion, is not a product of some misunderstanding as to the essential relief which Gaby requests. On the contrary, the majority recognizes the strategic considerations implicit in Gaby's desire to preserve the issue of the constitutionality of the 1962 Covenant. *Ante* (at 261). Nonetheless, in characterizing the constitutional arguments raised by Gaby as exemplifying a "limited purpose in pursuing the appeal," the majority misconstrues and frustrates the true interests of Gaby, and has done so in a manner which I find most distressing.

The majority justifies its truncated consideration of Gaby's plea by referring to an isolated phrase, taken out of context from a sentence which Gaby adopted as representative of his position in his cross-motion for certification. When more appropriately considered within the sentence in which it originally appeared, the phrase — "an alternative ground for affirming the decision below" — assumes an entirely different meaning from that which the majority attaches to it:

> **The purposes of this cross motion are identical with those stated by the State of New Jersey in its cross motion for certification: ". . . bring before the Supreme Court *all of the issues submitted to Judge Gelman* and to avoid the possibility that some of the issues submitted to Judge Gelman might have to be determined in the first instance by the Appellate Division. Because of the urgency and public importance of this case, it would be most unwise to require a piecemeal, appellate process, particularly since the [first] issue presented by this cross motion could be an alternative ground for affirming the decision below. . . ." [Plaintiff-cross appellant's appendix at 47a–48a; emphasis supplied].**

While the "first issue" refers to the constitutionality of the 1962 covenant, I believe it would be wrong to confuse Gaby's real interest in stimulating improvement of urban mass transportation with his more temporal interest in having the 1962 covenant declared unconstitutional. The majority not only fails to make this distinction, but fails to do so despite Gaby's expressed desire to present "all of the issues" to this Court.

This failure is only compounded by the majority's persistent willingness to ignore the Gaby complaint and the relief which it warrants. In spite of plaintiff's overindulgent concern for the constitutionality issue, the statement of his case reflects

more than a limited and perfunctory reference to the subject. During the course of oral argument, counsel for Gaby specifically stated:

> **Yes, as we read the compact between the states, the affirmative obligation of the Port Authority in this area is to plan. The immediate affirmative obligation . . . and indeed in these briefs and elsewhere, there is a suggestion that if the Covenant is invalid or the repealer upheld, either way, that it would be appropriate for the Court to direct the Port Authority to study mass transit needs in the Port Authority area and make proper proposals. Then when it comes to implementation, then you're talking about legislation of the two states, but the affirmative obligation of the Port Authority is to study the problem as it affects the Port area.**

It should be noted in passing, that this statement not only affirms the relief desired by plaintiff, but also embodies a request for a remedy which parallels that which I suggest below, *infra* at 287–288.

Therefore, although my Brothers remove the constricting fiscal shackles of the 1962 covenant, they fail to take the additional steps which flow as natural concomitants to the action which they affirm. This failure, as I see it, stems, in part, from a reluctance to go farther and faster in an area plagued by administrative inaction and intransigence. It also constitutes an indulgence in the meaningless gesture of sustaining the 1974 repealer without concurrently authorizing the relief needed to implement the initiative which the Legislature sought to instill in the Port Authority by that repeal.

As I fear, the administrative foot-dragging which was implicit in the 1962 covenant, may be only symptomatic of the inertia which has characterized the Port Authority in the field of mass transit operations. The majority's decision can only serve to perpetuate this sad state of affairs.

In light of the rapidly deteriorating condition of mass transit operations in the metropolitan area, this disposition is most unfortunate. Faced with the ever-increasing deficits which are inherent in this mode of public transportation, mass transit operations have been repeatedly shunned by the Port

Authority in spite of its statutory mandate to the contrary. As cutbacks in service have been experienced throughout the Port District, the commuters' resort to the private automobile has produced a dysfunctional volume of traffic congestion and pollution. The toll which this congestion has exacted has been obvious in the tunnels and on the bridges, whose operations the Port Authority apparently prefers to maintain.

Unlike today's majority, I am unwilling to assign plaintiff Gaby's case to death or to a peaceful somnambulism. This is particularly so where within the historical and evidential materials presented to the trial court reside the seeds for a more sweeping and effective disposition. I cannot sanction the mere repeal of the 1962 covenant without a concurrent assurance that the Port Authority will assume those responsibilities for which it was created and, which to this point, it has effectively avoided. The recalcitrance of the Port Authority has not been altered by the trial court's disposition and will not be altered by merely affirming that decision. A more effective disposition is needed.

II

HISTORY OF THE OBLIGATION OF THE PORT AUTHORITY TO PROVIDE MASS TRANSIT FACILITIES

In its opinion, the majority grudgingly acknowledges the Port Authority's obligation to become involved in mass transportation. After a perfunctory reading of the statutory framework of the Port Authority, the majority concludes that the existence of such a mandate is "a singularly appropriate subject for specific legislative directive, conspicuously absent here." (At 258).

While specific statutory directives have served as vehicles for recent Port Authority projects, *N. J. S. A.* 32:1–35.20 (authorization for the Port Authority to undertake mass transportation projects to link the various airports in the Port District), *N. J. S. A.* 32:1–35.21 (authorization to

build railroad lines to and facilities at the various airports in the Port District), its employment is in its infancy and affords no insight as to the previously reluctant forays which the Port Authority has made into the field of mass transportation. A full consideration of the statutory basis of the Port Authority and the history of its implementation reveals that the majority's interpretation of the Authority's powers and obligations is both short-sighted and erroneous. For instance, the statutory creation of the Port Authority evinces a clear legislative intent to have the Authority become involved in development of mass transportation. The majority position misconceives the role of the Authority to be a drone-like entity ultimately dependent upon enabling legislation, rather than a separate bi-state agency. Similarly, the majority fails to recognize the inherent limitations on the knowledge, information and expertise which are at the disposal of the New Jersey and New York Legislatures on the subject of mass transit operations. In light of this fact, the wisdom of relying upon legislative directives to address the panoply of needs within the field of mass transportation becomes problematical. The failure of the majority to account for these factors casts a large shadow upon the validity of its construction of the Port Authority's powers. These inadequacies within the majority position become apparent upon thorough consideration of the statutory origins of the Port Authority and the mandate which was encompassed in its original Compact and Comprehensive Plan.

A. Origins and Early Development; Compact and Comprehensive Plan

The Port Authority is a statutory product of a compact which was entered into by the States of New Jersey and New York in 1921.[1] Modeled after the recommendations of a joint

[1]New Jersey approved the compact by *L.* 1921, *c.* 151, now contained in *N. J. S. A.* 32:1-1 *et seq.* The comparable New York

commission,[2] the Port Authority represented a response to the dysfunctional competition and commercial disputes which historically had plagued the two states.[3] As such, it was intended to meet the needs and interests which the two states shared with respect to the Port of New York. This was expressly recognized in the preamble to the 1921 Compact, which stated:

> The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums

legislation was adopted in *Laws of New York* 1921, *c.* 154, now contained in *N. Y. Unconsol. Laws*, § 6401 *et seq.* (McKinney 1961). Congressional consent to the compact was granted by *Pub. Res. No.* 17, *S. J. Res.* 88, *c.* 77, 42 Stat. 174.

At the time of creation, the agency was designated "The Port of New York Authority." *N. J. S. A.* 32:1-4. This was amended by *L.* 1972, *c.* 69, §§ 1, 2, contained in *N. J. S. A.* 32:1-4 and 32:1-4.1, to the more ecumenical "The Port Authority of New York and New Jersey." For the purposes of this opinion, the agency shall be referred to as the Port Authority or just Authority.

[2]The New York, New Jersey Port and Harbor Development Commission was a body whose representative membership were created by independent, though concurrently enacted bills which were passed by the Legislatures of New Jersey and New York in 1917. Composed of three commissioners from each state, the commission issued a preliminary report in 1918, New York, New Jersey Port and Harbor Development Comm'n, *Preliminary Joint Report, Transmitted to the Legislature*, February 18, 1918 (1918). This was followed by a progress report in 1919, and a comprehensive report in 1920, in which the commission proposed the establishment of a permanent body with interstate jurisdiction. *Joint Report with Comprehensive Plan and Recommendations* (1920). It subsequently submitted the tentative draft of the proposed compact. See *Bard, The Port of New York Authority*, 24-34 (1942).

[3]The enmity between the two states traces its roots as far back as the seminal case, *Gibbons v. Ogden*, 22 *U. S.* (9 Wheat.) 1, 6 *L. Ed.* 23 (1824). Although it has from time to time received exhaustive consideration in the case law, *New Jersey v. New York*, 28 *U. S.* (3 Pet.) 461, 7 *L. Ed.* 741 (1830); 30 *U. S.* (5 Pet.) 284, 8 *L. Ed.* 127 (1831); 31 *U. S.* (6 Pet.) 323, 8 *L. Ed.* 414 (1832); *In the Matter of Devoe Mfg. Co.*, 108 *U. S.* 401, 406-10, 2 *S. Ct.* 894, 27 *L. Ed.* 764 (1883); *State v. Babcock*, 30 *N. J. L.* 29 (Sup. Ct. 1862); *Central RR. of N. J. v. Jersey City*, 70 *N. J. L.* 81 (1903), a concise presentation of its history may be found in *Bard, supra*, footnote 2, at 5-24.

of money, and the cordial co-operation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans. . . . [*N. J. S. A.* 32:1–1]

While the Compact delineated the framework for the Port Authority and its operations, the necessity for a more specific implementation was recognized in Article X, which directed the state legislatures to adopt "a plan or plans for the comprehensive development of the port of New York" "as soon as may be practicable." *N. J. S. A.* 32:1–11. The formulation of this plan was undertaken by the Authority's initial board of commissioners, whose *Report with Plan for the Comprehensive Development of the Port of New York, December 21, 1921* (1921) was eventually enacted as the Comprehensive Plan mandated by the Compact.[4]

This plan envisioned an active and affirmative role for the Port Authority in the development of the Port District.[5] Section 8 of the Comprehensive Plan provided:

The Port of New York Authority is hereby *authorized and directed to proceed with the development of the port of New York* in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state, to effectuate the same, except the power to levy taxes or assessments. [*N. J. S. A.* 32:1–33; emphasis supplied]

That fulfillment of this statutory mandate contemplated the involvement of the Port Authority in transportation matters of the Port District is undeniable. This responsibility, for

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[4]The Comprehensive Plan was enacted in *L.* 1922, *c.* 9, now contained in *N. J. S. A.* 32:1–25 *et seq.* New York approved the Comprehensive Plan in *Laws of New York* 1922, *c.* 43, now found in *N. Y. Unconsol. Laws* § 6451–68 (McKinney (1961)). Congressional consent was secured in *S. J. Res.* of July 1, 1922, *c.* 277, 42 Stat. 822.

[5]The metes and bounds of the Port District are defined in *N. J. S. A.* 32:1–3.

example, was explicitly mentioned in that portion of the preamble of the Compact cited above. Article XXII of the Compact further clarifies this responsibility by defining "transportation facility" as including:

. . . *railroads*, steam or electric, motor truck or other street or highway vehicles, tunnels, bridges, boats, ferries, carfloats, lighters, tugs, floating elevators, barges, scows or harbor craft of any kind, aircraft suitable for harbor service, and every kind of transportation facility now in use or hereafter designed for use for the *transportation or carriage of persons or property*. [*N. J. S. A.* 32:1–23; emphasis supplied]

The centrality of the railroads to the organizational and coordination schemes of the Port Authority was highlighted by the separate definition of "railroads."[6] This was a reflection of the final report by the New York, New Jersey Port and Harbor Development Commission, which in 1920 had recommended the establishment of a bi-state agency with appropriate jurisdiction. See footnote 2, *supra*. The report, whose factual findings served as the basis for the Compact and the Comprehensive Plan, found the commercial inadequacies of the metropolitan area to be "primarily a railroad problem." The absence of railroad coordination and accessibility at many places within the district consequently required "essentially a railroad plan." The Commission summarized its suggestions in a proposal which entailed the establishment of railroad beltline systems between New Jersey and New York, and concluded:

This remodeled terminal railroad system, bringing every railroad of the Port to every part of the Port, and thus giving every part of the Port opportunity to develop and to have the economical trans-

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[6]*N. J. S. A.* 32:1–23 provides:

"Railroads" shall include railways, extensions thereof, tunnels, subways, bridges, elevated structures, tracks, poles, wires, conduits, powerhouses, substations, lines for the transmission of power, car barns, shops, yards, sidings, turnouts, switches, stations and approaches thereto, cars and motive equipment.

portation service needed for its commercial and industrial growth and expansion, constitutes the comprehensive plan of the Commission — the plan which the Commission recommends for formal adoption by the two states. [New York, New Jersey Port and Harbor Development Commission, *Joint Report*, *supra* footnote 2, at 3]

This statutory responsibility to develop the transportation facilities of the Port District, and particularly facilities relating to railroad operations, contained an implicit obligation to foster passenger transportation service. Although the Port and Development Commission report concentrated on the freight shipment needs of the area, it did not preclude a comparable role for the Port Authority in passenger service. With one notable exception, the Port Authority's role in passenger service is confirmed by the early history of the agency. In this regard, however, even that exception, the 1928 veto message of Governor Alfred E. Smith of New York which rejected a New Jersey proposal for the development of a rapid transit system between the states, may be no more than a personal predilection. [7] See 134 *N. J. Super.* at 149. Noting that the Port Authority should "stick to this program . . .[for] the solution of the great freight distribution problem," Governor Smith at no time denied the agency's power to deal with passenger service, and only suggested a reordering of its priorities. More importantly, the position which he advocated was expressly repudiated by the Port Authority that same year. In a June 11, 1928 resolution supporting the continuation of a Suburban Transit Engi-

[7]Governor Smith, in what remains the only major statement questioning a Port Authority role in passenger traffic, remarked:

> I am satisfied that the Port Authority should stick to this program, and I am entirely unwilling to give my approval to any measure which at the expense of the solution of the great freight distribution problem will set the Port Authority off on an entirely new line of problem connected with the solution of the suburban passenger problem.

Veto Message, *Public Papers of Governor Alfred E. Smith of 1928*, 187–88 (1938).

neering Board,[8] the Port Authority recognized that it had a responsibility to the metropolitan commuter, based on its broader duty to develop transportation in the Port District:

> The Commissioners of the Port Authority have found in their studies that no adequate or effective interstate transportation development can take place without taking full account of *transportation of passengers* as well as of freight throughout the Port District.[9] [Emphasis supplied]

B. *Port Authority Involvement in the Area of Mass Transit; Reports, Studies and Legislation Concerning Mass Transit*

The continuance of its role in mass transportation has been reaffirmed by the Port Authority from time to time. The obligation to provide for passenger service within the

[8]The Suburban Transit Engineering Board had been created in response to a Port Authority suggestion in its 1927 Annual Report. As that report stated:

> It is our opinion that, in the long run, the greatest progress will be attained by having this Engineering Board undertake the responsibility for the preparation of the engineering section of a comprehensive suburban transit plan for the entire port district. The Port of New York Authority, *Annual Report for 1927*, 56 (Jan. 20, 1928).

Parenthetically, it should be noted that this body was the intended recipient of the funds which Governor Smith vetoed. The Port of New York Authority, *Annual Report for 1928*, 63 (Dec. 31, 1928).

[9]*Annual Report for 1928*, *supra* footnote 8, at 64–66. The Port Authority answered more directly the fears expressed by Governor Smith in a subsequent part of its June 11, 1928 resolution:

> The Commissioners of the Port Authority are satisfied from the reports of their staff that continuance of the work of the Suburban Transit Engineering Board and the participation therein by members of the staff of The Port of New York Authority will not at this time divert any of their efforts away from the effectuation of the statutory Comprehensive Plan nor from their duties in the field of protecting the Port nor from any other pending work of the Port Authority, but on the contrary, the continuance of such Suburban Transit Engineering Board's work will facilitate the other work of the Port Authority. [*Id.* at 65]

Compact's injunction to the Post Authority has not only been acknowledged by those whose occupations and interests are related to the transportation field,[10] but by ranking members of the Port Authority staff as well. For example, the following colloquy between Assemblyman J. Edward Crabiel and the Port Authority's then Executive Director Austin J. Tobin occurred at a 1958 legislative hearing:

> ASSEMBLYMAN CRABIEL: Mr. Tobin, just to clear my mind on certain key points — I have been reading your report and listening to your talk — there is no question that, as far as the compact between the two states is concerned, ***the Legislatures could direct the Port Authority to do rapid transit and that that would be within their compact.***
>
> MR. TOBIN: ***Yes sir. There's no question about it.*** [***Hearings on Assembly Bills No. 16 and 115 and Senate Bill No. 50, supra*** footnote 10, Nov. 24, 1958, at 44] (emphasis supplied).

The manifestations of this responsibility have been insignificant such as the separate sections which the Authority devoted to "Suburban Transit" in its earlier Annual Reports (a practice by the way, which has been resumed since the Port Authority's acquisition of the H & M railroad in 1962). See T. W. Kheel & R. J. Kheel, "The Port Authority 1962 Covenant — Bar to Mass Transportation," 27 *Rutgers L. Rev.* 1, 5(1973); The Port of New York Authority, *Annual Report for 1923,* "Commuter Passenger Traffic," 35–36 (Jan. 19, 1924); *Annual Report for 1924,* "Congestion of Passenger-Traffic," 23–24 (Jan. 24, 1925); *Annual Report for 1929,* "Suburban Transit," 27–28 (Dec. 31, 1930). More indicative, however, of the Port Authority's

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[10]See ***Hearings on Assembly Bills No. 16 and 115 and Senate Bill No. 50 before N. J. Assembly Comm. on Fed. & Interst. Rels. and Assembly Comm. on Highways, Transp. and Pub. Utilities,*** Nov. 24, 1958, at 18A (Statement of Augustus S. Dreier, Counsel, Inter-Municipal Group for Better Rail Service); Dec. 3, 1958, at 22-A (Statement of Herman T. Stichman, Trustee, Hudson & Manhattan Railroad) (hereinafter referred to as Assembly Hearings); ***Caro, The Power Broker Robert Moses and The Fall of New York,*** 922–23 (1974).

role in rapid transit operations have been the infrequent reports which it has issued on this subject.[11] The representativeness of at least 14 of these reports cannot be premised on any successful projects which they have stimulated or realized. As frankly admitted by Edward J. O'Mara, a chairman of the Metropolitan Rapid Transit Commission (a Port Authority-funded investigative agency which itself produced an unsuccessful series of legislative proposals):

> For at least 35 years, there has been a growing public awareness of the importance of mass transportation in the metropolitan region in the State of New Jersey. At least 14 more or less extensive studies have been made of the problem by various committees and commissions. Nothing has ever come of them, and in the meantime the problem has been becoming progressively more acute. [***Assembly Hearings,*** Nov. 24, 1958, at 70A]

See also 2*d Hearing before N. J. Sen. Comm'n (Created un-*

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[11]These reports have been conducted on a variety of topics and in conjunction with various other interested organizations. Some, though by no means all, of these studies have included a continuing study begun in 1927 of the suburban transit facilities to relieve traffic congestion in conjunction with a variety of other groups (pursuant to New Jersey legislative authorization, *L.* 1927, *c.* 277); a 1937 study entitled "Suburban Transit for Northern New Jersey (Mar. 1, 1937) concerning interstate and suburban passenger problems within the Port District and New Jersey in particular (undertaken pursuant to *L.* 1936, *c. J. Res.* No. 6); a continuation of studies begun in 1937 and the presentation of legislative proposals for implementing a new transit system (pursuant to *L.* 1938, *c. J. Res.* No. 1); a 1948 study concerning the development of a rapid transit system in Northern New Jersey which would link Newark Airport and New York City (undertaken pursuant to a request by New Jersey Governor Alfred E. Driscoll); 1948 study concerning the development of a north-south transit line in Hudson County (initiated at the request of the City of Bayonne); and the creation in 1952 of the Metropolitan Rapid Transit Commission to undertake a comprehensive study of the transit problems of the Port District (*L.* 1952, *c.* 194). By agreement reached in 1955, the Port Authority provided $800,000 when this last study was inaugurated. The Commission's report was released in 1958. In addition, the Port Authority in the early 1960's conducted a series of studies concerning the feasibility of its acquiring the operations of the H & M railroad, and later, the conditions under which the authority would do so.

der Sen. Res. No. 7 (1960) and Reconstituted under Sen. Res. No. 7 (1961)) to Study the Financial Structure and Operations of The Port of New York Authority, Jan. 27, 1961 (2d day), at 64–66 (Statement of Austin J. Tobin, Executive Director, Port of New York Authority). In this respect, these studies provide a broad overview of the historic approach of the Port Authority to the problems of urban mass transit. This background is particularly important because what the Court is truly asked to consider is the manner in which the Port Authority has dealt with the problems of mass transit in the Port District, and the attitudinal reluctance which has characterized its efforts in this area of transportation.

These studies, in conjunction with the annual reports which are issued by the Port Authority, possess several characteristics worth noting. First, virtually none of the studies resulted from the Port Authority's own initiative. Most of the studies were the product of either legislative or other governmental requests for pertinent information and proposals. See footnote 11, *supra*. While the failure to take affirmative administrative or investigatory action may not necessarily be indicative of an agency's abdication of responsibility in the case of the Port Authority, the failing is particularly suspect. This is because the duties expressly imposed on the Port Authority by the 1921 Compact were those to "make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted;"[12] and to suggest to the state legislatures recommended means to improve Port commerce.[13]

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[12] *N. J. S. A.* 32:1–12, which was contained in the original Compact as Article XI and which is indicative of a statutory mandate, provides:

> The port authority *shall* from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two states, they shall be binding upon both states with the same force and effect as if incorporated in this agreement. [Emphasis supplied]

[13] *N. J. S. A.* 32:1–13 provides:

> The port authority may from time to time make recommendations to the legislatures of the two states or to the congress of the United States, based upon study and analysis, for the better conduct of the commerce passing in and through the port of New York, the increase and improvement of transportation and terminal facilities therein, and the more economical and expeditious handling of such commerce.

Second, none of these studies contains an expressed commitment (much less a recommendation of such a commitment) by the Port Authority to undertake the construction or implementation of a mass transit system. Instead, most of them recommend the assumption of these obligations by other governmental or quasi-governmental bodies and agencies. See The Port of New York Authority, *Suburban Transit for Northern New Jersey*, 10 (1937); The Port of New York Authority, *Annual Report for 1958*, 38–42. In conjunction with this, it should be noted that the Authority was one of the staunchest supporters of two New Jersey legislative proposals, S–50 and A–115, which were introduced and discussed in 1958. See *Assembly Hearings, supra*, Nov. 24, 1958, at 44, 49 (Statements of Austin J. Tobin, Executive Director, Port of New York Authority). Not surprisingly both of these measures presented plans for the establishment of an independent agency to handle matters relating to mass transportation. Conversely, the Port Authority was strongly opposed to a companion proposal, A–16, which would have authorized the agency itself to develop, improve and coordinate the rapid transit facilities in the Port District. *Assembly Hearings, supra*, Nov. 24, 1958, at 18–19 (Statements of Austin J. Tobin, Executive Director, Port of New York Authority).[14]

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[14] On this point, a noted transportation expert, Michael N. Danielson, observed:

> A good many people in the New York area, particularly in New Jersey, could see no point in creating another agency, whether bi-state or tri-state, as long as the Port of New York Authority apparently possessed both the jurisdiction and financial capacity to tackle the regional rail problem. Time and again, the Port Authority fended off these forays, emphasizing that there was an "absolute incompatibility between railroad deficits and the PNYS'S contractual limitations with its bondholders . . . and to confine itself to self-supporting projects." [*Danielson, Federal-Metropolitan Politics and the Commuter Crisis*, 23 (1965)].

Finally, as previously noted, there has been a startling absence of tangible progress resulting from, or attributable to these investigatory efforts. This is true even though the Port Authority has recognized the commuter problems which beset the New York metropolitan area. As early as 1925, in its Annual Report, the Authority observed:

> **While hundreds of millions of dollars have been spent in urban rapid transit during the past decade, no commensurate amounts have been expended on suburban rapid transit, and the commuter has reached the limit of his endurance where the trunk lines leading into New York City are incapable of handling both suburban and through traffic. The passenger service of every railroad in the Port District is taxed to its limit by the requirements of this service. There is barely room during the rush hours for the trains carrying freight because of the commuter service, while passengers and freight must both necessarily move during these hours. [The Port of New York Authority, *Annual Report for 1924*, 23 (Jan. 24, 1925)]**

See also The Port of New York Authority, *Annual Report for 1927*, 10, 53 (Jan. 20, 1928). Over the years, this recognition has increased with its realization of the expanding dimensions of commuter congestion and the inability of private transit facilities to cope with the problem. The Port of New York and New Jersey, 1972 *Annual Report*, 10–15 (1972); 1973 *Annual Report*, 10–15 (1973); 1974 *Annual Report*, 4–6 (1974).

The Port Authority's ineffectual investigative efforts cannot be justified due to a theoretical lack of jurisdiction in mass transit operations. Such jurisdiction was given to the agency in the Compact of 1921. Nor is the lack of success due to the financial inability of the Port Authority to assume additional obligations. As the trial court found, the Authority is not only financially sound, but has suffered no detrimental effects from the repeal of the protective 1962 Covenant:

> **Suffice it to say that between 1962 and 1974 the security afforded bondholders had been substantially augmented by a vast increase in Authority revenues and reserves, and the Authority's financial ability to absorb greater deficits, from whatever source and without any**

> **significant impairment of bondholder security, was correspondingly increased. [134 *N. J. Super.* at 194–95]**

Rather, the limited effectiveness of these studies is merely symptomatic of an underlying limitation which the Port Authority has imposed on its own involvement in mass transportation. This limitation, which is derived from a narrow construction of its statutory powers, precludes an undertaking by the Authority unless the relevant project will be financially self-supporting, or will only generate deficits within conservatively defined limits. While the definition of the limitation is presented in purely financial terms, its effect has been to severely restrict the scope of activities in which the agency may engage. Because the majority of mass transportation facilities are closely associated with high deficits, the practical operation of the Port Authority's self-imposed restriction has prevented the Authority from fulfilling its rapid transit obligations.

C. *History of the Self-Supporting Concept*

While the provisions of the Compact and Comprehensive Plan sketched a broad authorization in terms of the activities which were within jurisdiction of the Port Authority, the powers accorded to it were not commensurate with its tasks. Without the necessary power, the Authority could not unilaterally support its statutory mandates, much less initiate action in their behalf:

> **An impressive body of activities was thus laid out wherein the Port Authority could formulate the needs of the port as a whole and be vigilant to protect its interests. It would serve as a focus and agent of the forces of unity within the port. The primary requirement in this field would not be legal power but adequate funds and continuous application. The Port Authority never lacked support with respect to the former, and was well conceived to function with respect to the latter. But success along this line of endeavor would depend upon cooperation from public agencies and private interests. Where conflicts developed it could make progress very slowly, if at all. [*Bard*, *supra*, footnote 2, at 58–59]**

As a result of setbacks incurred in early legal skirmishes with the powerful railroads in the 1920's, the Port Authority appeared to assume a less assertive role in the port's development than that anticipated by its proponents. Reluctant to promote otherwise desirable activities within the Port District, the Authority restricted its goals to the dubious task of maintaining a balanced budget. The difficulty of this objective was compounded by the fact that under both the Compact and the Comprehensive Plan, the Port Authority had been denied the power to either levy assessments or pledge the credit of either state. *Annual Report for 1954*, vi (1954). Consequently, to offset the costs and losses which it incurred, the agency was dependent upon the revenues which it realized from its various projects and facilities.

While this new objective in the early years of the Port Authority was tempered by a "rule of economic practicability," The Port of New York Authority, *Annual Report for 1926*, 5 (Jan. 20, 1927), its importance was later elevated by the increased emphasis placed on self-sufficiency. In other words, because the fiscal stability of the Port Authority was dependent upon the revenues of its facilities, it was necessary for all projects to demonstrate their self-supporting capacity before the Authority would undertake their implementation. Thus, James C. Kellogg, III, the then Vice-Chairman of the Port Authority, read from a prepared statement before a Senate Commission in 1960, as follows:

In order that the Port Authority might carry out the tremendous and continuing task of developing the public terminal and transportation facilities of this metropolitan area, the two Legislatures clothed it with all necessary and appropriate powers of port and terminal development, with the important exception of the power to tax or to levy assessments. This reservation is the key to the whole concept of the Port Authority, which is that of a self-supporting agency, whose public projects are carried on through the development of their own revenues and charges, and which imposes no burdens on the general taxpayer. [*Hearings before N. J. Sen. Comm'n Created under Sen. Res. No. 7 (1960) to Study the Financial Structure and Operations of the Port of New York Authority*, September 27, 1960, 7–8 (Statement of James C. Kellogg, III, Vice-Chairman of the Port Authority)].

The objective of a self-supporting authority, while salutary in principle, was inconsistent with the Port Authority's original objectives and early history. In its annual report for 1924, the Authority explicitly rejected the self-supporting concept as a basis for its operations:

Preferably, and in the main, therefore, the Port Authority regards itself rather as the guardian and guide of the Port District, protecting it against attacks both from within and without, and directing its activities and developments with a view to procuring the greatest cooperation of existing agencies, the utmost efficiency and the minimum of cost. *If such is to be its primary function it should not be expected to be self-supporting.* [The Port of New York Authority, *Annual Report for 1924*, 9–10 (Jan. 24, 1925); emphasis supplied]

Moreover, the self-supporting concept as a fundamental precept of the Port Authority's financial scheme is belied both by the projects which it embarked upon after its creation and by subsequent developments in its financial structure. As the trial court observed, because of the heavy investment required by these early projects, the Port Authority was confronted with large deficits from the outset. 134 *N. J. Super.* at 140. However, rather than restricting the Authority's activities, New Jersey and New York encouraged such projects by advancing funds, transferring control of lucrative facilities (such as the Holland Tunnel) to the Authority, and permitting the Authority to issue "open-ended" bonds. This latter device, in particular, helped free the Port Authority from absolute reliance on self-supporting projects. By placing all revenues derived from the sale of open-ended bonds into a common fund, the Port Authority was able to free deficit operations from the inadequate sales of their particular bonds. *Goldberg, A History of the Port of New York Authority Financial Structures*, 5 (1964). The pooling of resources not only permitted the Port Authority to finance debt-ridden facilities through those which were profitable, but simultaneously afforded bondholders a certain degree of security regardless of the success or failure of any given project. The open-ended financing of the Port

Authority, which was originally introduced in the form of the General Reserve Fund (*N. J. S. A.* 32:1–142), literally, the pool into which all funds were paid, was later expanded by the Authority's adoption of the Consolidated Bond Resolution in 1952. This resolution, which abandoned the practice of earmarking funds for specific projects, authorized the issuance of bonds whose revenues would be designated by the Authority for a given project according to its needs. As the trial court found, the resolution obviated any further concern for maintaining the self-supporting concept as a prerequisite to Port Authority involvement in a project:

> **With the adoption of the CBR the "self-supporting" facility concept which had governed earlier authority financing ceased to have the significance previously attached to it; for under the CBR the Authority's financial structure is based on a unitary enterprise concept and all revenues from all facilities are pooled. Individual facilities are not financed independently of the rest of the Authority. The facilities contribute their revenues for debt service on all Authority bonds according to their earning power and without regard to the amount of bonds issued for the construction of any particular facility. [134 *N. J. Super.* at 143]**

Enactments such as the General Reserve Fund and the Consolidated Bond Resolution created the possibility for the involvement of the Port Authority in traditionally deficit operations such as mass transportation. Nonetheless, the translation of this new financial freedom into practical action was not forthcoming from the Port Authority:

> **That cashbox, so long empty, was full now, thanks to the postwar traffic boom, . . . the Port Authority's was worth $700,000,000. Long on cash, moreover, the Port Authority was short on dreams. The visionaries who had created it were long gone from its councils; Julius Henry Cohen had been replaced by money men like Cullman and Colt and Pope whose eyes were brightened by the balances in the Authority's ledgers, not by the potentialities for improving the common weal that those balances represented. The purpose for which the Authority had been created — the development of an *overall* transportation system to knit together a great port — had been lost sight of for years. Plans the Authority had aplenty, of course, but unrelated plans, plans for individual projects, joined by no link other than the fact that their construction would return the agency profit. [*Caro, supra*, footnote 10, at 922–23]**

The resultant program which the Port Authority pursued represented less of an integrated effort to organize and coordinate the commerce of the port of New York, and more of an administrative mish-mash with little cohesiveness or relation to the agency's statutory mandate. Thus, construction of a World Trade Center, with little or no relation to the activities for which the Port Authority was created, was suddenly elevated to an importance which transcended that of a more traditionally-regarded responsibility of the Authority such as mass transportation.

The underlying rationale for these actions was unmistakably attributable to retention of the self-supporting limitation to which the Port Authority had previously adhered. This was made clear by Executive Director Tobin of the Port Authority when questioned at a 1958 hearing about the manner in which future revenues and reserves would be committed:

> **Well, it is closed unless those future bond issues have to do with projects that can be made self-supporting and in which the Commissioners of the Port Authority will not only certify as *a matter of conscience* and a matter of record that they believe that they can be made self-supporting and will add to the general credit of the Port Authority; but also if they can demonstrate arithmetically on sound projections of its existing net revenues and its maximum future debt service that those projects will not hurt this bondholder. That's all he has. If that bondholder has an open end bond without those restrictions, he has a piece of paper. [*Assembly Hearings, supra*, November 24, 1958, at 38 (Statement of Austin J. Tobin, Executive Director, Port of New York Authority); emphasis supplied]**

This self-limitation has exacerbated the Port Authority's demonstrated lack of initiative. For example, although the Port Authority in 1955 agreed to provide the Metropolitan Rapid Transit Commission with $800,000 for that body's study of a metropolitan scheme of mass transit, the price which the Authority extracted for its financial support was a "Memorandum of Understanding" which precluded its own role in any deficit operations which the Commission

might recommend. *Danielson, supra* at 23; *Assembly Hearings, supra,* December 3, 1958, at 91–A to 92–A (Statement of Frank H. Simon, Executive Director, Metropolitan Rapid Transit Commission). More importantly, perhaps, the Port Authority's inertia has interjected itself in the relationship between the agency and the Legislatures which it allegedly serves. This has been done in an often contradictory fashion as illustrated by the following discussion between Assemblyman Crabiel and Executive Director Tobin:

ASSEMBLYMAN CRABIEL: What I'm getting at here is, you're saying categorically that you cannot take a deficit. Now, I'm raising the point that as far as the Legislatures of the two states, when they established the compact there was nothing in the compact and nothing in the instructions from the Legislatures to the Port Authority that they could not undertake a deficit operation.

MR. TOBIN: Well, excuse me, sir. I'd say that there was. I would say that the way the statutes are phrased, it could undertake nothing except a self-supporting operation. We have no way of financing anything but a self-supporting operation.

ASSEMBLYMAN CRABIEL: Well how do you account for the fact, then, that you have operated deficit operations?

MR. TOBIN: Because the pooled revenues have been sufficient. Because we believed also, when we went into those, that they could be self-supporting and we were wrong.

ASSEMBLYMAN CRABIEL: That's what I was pointing up. [*Assembly Hearings, supra,* November 24, 1958, at 45]

III

THE ROLE OF THE PORT AUTHORITY

Ultimately, those who are most hurt by the Port Authority's failure to enter the field of mass transportation are, of course, the commuters. Absence of Port Authority initiative in this area is a direct reflection of the deficits which are inherent in the provision of this public service:

Until the late 1950's, transit operations in the United States were generally profitable and, consequently, attractive to investment. Decline in patronage and increasing labor and equipment costs have completely reversed this trend to a point where today, public transit in its everyday operations in most cities is a losing proposition. The losses are not as great as sometimes presumed but, in most

cases, average between 20 and 25 percent annually. Therefore, public transit — like many other sectors of the transportation industry, including private automobile transportation — now requires substantial public support in the form of direct financial subsidies to be capable of rendering necessary services. [Roeseler and Levi, "State Subsidies for Public Transit: An Overview of Current Legislation," 4 *Urban Lawyer* 59, 60 (1972)]

See also Kneafsey and Edelman, "A Market-Oriented Solution to the Northeast Railroad Dilemma," 41 *I. C. C. Pract. J.* 174 (1973–74). This problem concerning the financial weaknesses of mass transit facilities has been realized within the New York metropolitan area. This, no doubt, has resulted from both the unusually heavy demands which have been placed on these systems in the Port District, and the lack of a perceived common interest among the District's geographic and political components. *Danielson, supra,* at 21–22.

The Port Authority's failure to assume an active role in solving this problem has had a concurrent effect on the traveling habits of the average commuter. Faced with increasing service cutbacks and escalating fares, the commuter is left with fewer alternatives to the private automobile. Grubb, "Urban Transportation Alternatives to the Automobile," 39 *I. C. C. Pract. J.* 19 (1971–72); Cooper, "Prospects for a Mass Movement to Public Transit," 5 *Urban Lawyer* 679 (1973). His increasing resort to this mode of transportation in turn has caused a drastic increase in traffic congestion and air pollution which are commonly associated with the metropolitan area.

These problems have stimulated legislative responses on both the federal and state levels. The federal response consists primarily of the Urban Mass Transportation Act of 1964, 49 *U. S. C. A.*, § 1601 *et seq.*, which purports to encourage "the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private." 49 *U. S. C. A.*, § 1601. See Haley and Watkins, "The Urban Mass Transporta-

tion Assistance Act of 1970 — A Federal Program Comes of Age," 16 *N. Y. Law For.* 741 (1970). As a corollary to the urban mass transit crisis, the federal government has enacted the Clean Air Act, 42 *U. S. C. A.*, § 1857 *et seq.* Similar considerations produced comparable legislation in New Jersey, Emergency Energy Fair Practices Act of 1974, *L.* 1974, *cc.* 2, 6; Executive Order No. 1 (Feb. 5, 1974).

These legislative enactments were most recently recognized in a report issued by the Joint Transportation and Communications Committee of the New Jersey Legislature. *Report of the Senate and General Assembly Joint Transportation and Communications Committee (Pursuant to Assembly Concurrent Res. No. 211 of 1974)*, October 6, 1975. As the report noted:

> The legislation passed by New Jersey during the last four years clearly reflects the determination on the part of its officials to direct the Port Authority towards making a greater financial commitment to mass transit. In order to determine whether New Jersey has been treated by the Port Authority in a fair and impartial manner the Committee has investigated the degree of Port Authority responsiveness to meeting the mass transportation needs of the State. [*Id.* at 13]

The Committee's conclusion was succinct as it was unfortunate:

> The Committee recognizes that the Port Authority has acquired a reputation for its engineering, planning and management skills. It is the conclusion of the Committee, however, that in the area of mass transportation the Port Authority's performance has not been satisfactory. [*Id.* at 17]

The Committee's conclusions were premised upon the same type of factors which I have considered above. While the Committee was hopeful that the Port Authority would take its mass transportation responsibilities "more seriously" in the future, it nonetheless pledged "its vigilance to see that the

Port Authority completes the mass transportation projects it has promised to complete." *Id.* at 18, 19.[15]

The sensitivity of the state government to the urgent need for more modern means of public transportation has not been confined to the legislative branch. In his recent "State of the State" address, Governor Byrne not only recognized this problem, but concurrently cited the Port Authority's responsibility for its solution. Perhaps even more important, the Governor indicated his willingness to impose an affirmative sanction on the Port Authority should the desired action in the area of mass transit not be forthcoming:

> How do we keep the railroads running at a time when the state subsidy program costs over $100 million a year and has been growing by more than 35 per cent a year? Should there be an overall operating agency for these lines? What about the communities and industries served by lines soon to be abandoned? Where can we find the $255 million required to match federal funding for the

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[15]While the history of the Port Authority's involvement in mass transportation has been discouraging, the prospects for renewed efforts by the agency in this area of endeavor are hopeful. In the above cited report by the Legislature's Joint Transportation and Communications Committee, the development of a mass transportation plan by the Port Authority was noted. *Report of the Senate and General Assembly Joint Transportation and Communications Committee (Pursuant to Assembly Concurrent Res. No. 211 of 1974*, 16–17 (October 4, 1975)). This plan committed the Port Authority to the provision of additional direct rail service to Penn Station in New York City for New Jersey commuters, the expansion of the Midtown Bus Terminal, the construction of a rail link to Kennedy Airport and the extension of the PATH system from Newark to Plainfield. Although the Urban Mass Transportation Administration on December 19, 1975 rejected New Jersey's request for $278-million to construct the PATH extension, the State's expressed intention to reapply for such funds will create the possibility of a continued role for the Port Authority in mass transportation. *The Sunday Star-Ledger*, December 21, 1975, at 1, 8; *The New York Times*, December 22, 1975, at —; *The New York Times*, January 4, 1976, at 34. This persistence has apparently been successful as federal approval of a $400-million block grant for the PATH extension to Plainfield and other mass transit projects is anticipated. *The Star-Ledger*, February 10, 1976, at 1.

modernization of two major commuter lines and the extension of PATH to Plainfield?

The Port Authority of New York and New Jersey must increase its commitment to these efforts. If it is unwilling to do so, we will insist that it rescind the toll increases instituted last year for the specific purpose of funding improvements in the public transportation system. [Annual Message of Governor Brendan T. Byrne, Jan. 13, 1976, at 19]

I, too, would similarly take this opportunity to demonstrate the vigilance which has motivated the Joint Committee and the Governor. The Port Authority has too long neglected the responsibility with which it was statutorily charged in 1921. In *So. Burlington Cty. NAACP v. Tp. of Mt. Laurel*, 67 *N. J.* 151, 189 (1975), we recognized the significance of transportation to the overall development of an urban area. I would today reaffirm this significance.

IV

CONCLUSION

The relief which I recommend today is intended as an answer to a problem which has assumed crisis proportions. The Port Authority is the producer, the director and the main character of the play known as "The Disease of Mass Transportation." This malady has suffered too long from the benign neglect of public agencies such as the Port Authority, and such neglect has permitted the disease to spread unattended. The resulting state of affairs may most accurately be described as one of emergency. While the appellation "emergency" was at one time reserved for calamitous and natural occurrences, the inadequate and deteriorating quality of mass transit in the metropolitan area has had an eroding effect on the urban environment in which it operates. This effect has been measurable not only in terms of the unending lines of commuters who have been inconvenienced by inefficient service, but also in terms of traffic congestion with its attendant pollution as well. The courts of this country have long recognized that such emergent circumstances may

serve as a mandate to administrative action. "While emergency does not create power, emergency may furnish the occasion for the exercise of power." *Home Building & Loan Ass'n v. Blaisdell*, 290 *U. S.* 398, 425–26, 54 S. Ct. 231, 235, 78 *L. Ed.* 413, 422 (1934); *Hourigan v. North Bergen Tp.*, 113 *N. J. L.* 143, 148 (E. & A. 1934).

For an Authority that is long on cash and short on dreams,[16] it is time to respond for those who have long suffered the inconvenience and expense which have resulted from the Port Authority's inaction.

I would order the Port Authority, its Commissioners and its Executive Director to not only complete those projects to which it is already committed, but to formulate and present plans and suggestions for a regional mass transportation scheme to the Legislatures of New York and New Jersey. Implicit in this would be the requirement that such efforts be completed in an expeditious fashion and within a fixed period of time. This injunction is necessary to bring home the importance of Authority action in the face of the current transportation crisis.

In proposing this relief, I should not be understood as advocating usurpation of the functions of either the executive or legislative branches of government. The majority's characterization of my position is in error. (At 259). My disposition does not contemplate ordering either the Governors or the Legislatures of the States of New Jersey and New York to undertake any particular course or courses of action. I would be loathe to intrude upon the relationships which have developed between these other branches of state government and the Port Authority. Nonetheless, I am all too aware of the fact that expertise in the field of mass transit operations resides in the body which was originally vested with both power and jurisdiction in that area, namely the Port Authority. By according the Authority a statutory mandate to

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[16] *Caro, supra, footnote* 10 at 922.

undertake mass transportation projects, it was anticipated by both States that the Port Authority would actively research, promote and recommend projects to be authorized and implemented by the State Legislatures. It is precisely the Port Authority's reluctance to utilize its expertise that has frustrated this basic first step towards the development of a much-needed integrated mass transportation system in the metropolitan area. Therefore, I would order the Port Authority to proceed with this initial planning stage, while, at the same time, acknowledging that ultimate adoption and implementation of the resultant plans remain a legislative and executive prerogative. The declared willingness of those branches of government to adopt appropriate measures leaves me confident that only timely suggestions by the Port Authority are needed to point the direction towards improved mass transit operations.

Although I am unsure whether it is the perception of my suggested order as a usurpation of executive and legislative function which underlies the majority's disagreement with such relief, I am, nonetheless, clear in my opposition to the lesson in civil procedure which the majority would impose on this case. I find that the majority's exercise of power under a writ of *mandamus* would ill-befit a remedy with such a Marshallian association. *Marbury v. Madison,* 5 *U. S.* (1 Cranch) 137, 2 *L. Ed.* 60 (1803). This is a direct result of not only the restrictive but the erroneous construction which the majority gives to the powers implicit in a *mandamus.* The writ of *mandamus* is a remedial process whose essential function is to compel the performance of a ministerial action *or the exercise of a discretionary function. Roberts v. Holsworth,* 10 *N. J. L.* 57 (Sup. Ct. 1828); *Switz v. Middletown Twp.,* 23 *N. J.* 580 (1957). This mode of relief is particularly appropriate with regard to recalcitrance by public officials or authorities. *Bd. of Taxation v. Belleville,* 92 *N. J. Super.* 338, 340–41 (Law Div. 1966). While the court has the power under a *mandamus* to compel action, it does not similarly have the power to control discretion in the performance of

the designated action. Such discretion properly resides in the functioning authority.

By its construction of the *mandamus,* the majority would not only accord the authority discretion in the manner of performing the compelled action, but would permit the authority discretion as to whether the ordered action should be performed at all. Although the majority has recognized that the Port Authority has resisted efforts to promote its involvement in mass transportation, it would consider this to be an exercise of discretion which would preclude a *mandamus* or an order similar to the one which I have suggested:

> **As we have sought to demonstrate, the circumstances before us do not at all invite or accommodate the remedy proposed. This is so because the Authority (whose function is clearly not ministerial) has in fact exercised its discretion, even though that exercise has resulted in the rejection of a policy favoring mass transportation. Being a judgment decision its wisdom may be open to dispute; but as to the propriety of this Court's refusal to intrude on the underlying policy determination, there can be no question in the circumstances before us [At 259].**

I cannot subscribe to such reasoning, whose circular nature would undercut the relief which the majority otherwise feels warranted under the circumstances and which would effectively emasculate the *mandamus,* or any similar relief, as a remedy.

I reject the majority's approach to the problem of this case within a procedural context. We have been taught that there are no rights without remedies. By stripping us of our remedies, the majority is most assuredly divesting us of our rights. *Marbury v. Madison, supra,* 5 *U. S.* (1 Cranch) at 163, 2 *L. Ed.* at 69. Furthermore, we have long passed the days wherein cases were decided on the niceties of procedural technicalities. *Hodgson v. Applegate,* 31 *N. J.* 29, 43 (1959); *Edelstein v. Asbury Park,* 51 *N. J. Super.* 368, 385 (App. Div. 1958). There is no need to resurrect in this case another of these manifestations of by-gone days.

Even if I were to acknowledge the necessity of specifically resorting to a *mandamus* or its equivalent, I could not justify withholding such relief in this case; nor can I presently understand the distinction which the majority draws between the *mandamus* which they recommend and the order which I propose. Granting that mandamus is an "extraordinary remedial process," *Beronio v. Pension Comm'n of Hoboken,* 130 *N. J. L.* 620, 623 (E. & A. 1943), aff'g 129 *N. J. L.* 557 (Sup. Ct. 1943), I cannot see the unfortunate plight of the more than 30 million commuters who are dependent upon the Port Authority's transportation services annually, nor the Authority's benign neglect of their plight, as being anything less than extraordinary. This is particularly so where to adopt the majority's approach would permit the Port Authority to ignore the statutory responsibilities with which it was charged in 1921.

The majority in *Gaby v. Port of New York Authority* has been unwilling to take the action which I regard as imperative. From its disposition I must, therefore, respectfully dissent.

For affirmance—Justices MOUNTAIN, SULLIVAN and CLIFFORD and Judges CONFORD, CARTON and HALPERN—6.

Concurring in part and dissenting in part—Justice PASHMAN—1.

Excerpt from Exhibit P-1

DUN & BRADSTREET, INC.

MUNICIPAL CREDIT REPORT

December 28, 1961 Bond Sale 1-4-62 Revenue Service

THE PORT OF NEW YORK AUTHORITY

Prospects: SUPERIOR. The Port of New York Authority is a financially strong, multi-purpose, bi-state agency with a substantial history of accomplishments. It has competent management and continues to draw heavily on its ample earnings and borrowed funds to finance large programs of capital improvements. Among the programs now under way are construction of a second deck to the George Washington Bridge and related improvements, redevelopment of LaGuardia Airport, development of New York International Airport, improvements at Newark Airport, development and improvement of Port Newark and the Brooklyn-Port Authority Piers, and enlargement of the Port Authority Bus Terminal and the Lincoln Tunnel approaches connecting with it. Numerous efforts have been made to have the Authority assist in solving the commuter railroad problem in the area, and one program appears to be about ready to proceed. Under it the Authority will purchase commuter railroad cars for commuter railroads operating between New York State municipalities, and as a financial safeguard the financing of this program is insulated from the remaining financial structure of the Authority. The proposal to have the Authority take over the bankrupt Hudson & Manhattan Railroad has not yet secured the necessary legislation from both states, but efforts to tie this program in with the proposed World Trade Center, which the Authority has in planning, appear to be meet-

ing with more enthusiasm than the initial proposal. No recent developments have been reported concerning additional airport facilities.

Bond Sale: The Port of New York Authority is offering for public sale on January 4, 1962, $25,000,000 Consolidated Bonds, Nineteenth Series (First Installment), dated November 1, 1961, and due November 1, 1991. The bonds will be retired periodically, however, and for this purpose a mandatory periodic retirement schedule is specified, in amounts that will allow retirement annually by November 1 ranging upward from $250,000 in 1964 to $2,000,000 in 1991. The bonds are callable at the Authority's option on any November 1 beginning 1964 at 103% to meet the retirement schedule or on any interest payment date beginning November 1, 1968 at 103% other than to meet the retirement schedule; both call provisions specify a declining scale of premiums. Interest will be payable May 1 and November 1 at the rate named by the purchaser. The bonds will be coupon in form, registerable as to principal alone, or as to both principal and interest and, if so registered, convertible into coupon bonds at the expense of the holder. The bonds will be payable on a par with the Authority's other Consolidated Bonds, as described below. All legal proceedings pertaining to these bonds are subject to approval by Sidney Goldstein, General Counsel of the Authority, and by Hawkins, Delafield & Wood, Bond Counsel for the Authority.

Bonded Debt: The Authority's gross bonded debt as of November 30, 1961, adjusted to include the bonds now offered, amounts to $657,745,000. This total includes $50,692,000 General and Refunding Bonds, Series 8 through 12 and 15; $64,512,000 Air Terminal Bonds, Series 1 through 3; $7,630,000 Marine Terminal Bonds Series 1 and 2; and $534,911,000 Consolidated Bonds, Series 1 through 19. The

Authority also had outstanding at November 30, 1961, $35,000,000 Series K Consolidated Notes due December 28, 1961, which will be refunded in part by proceeds of the current bond offering. The bonds now offered, like the outstanding Consolidated Bonds, are issued under and secured by the Consolidated Bond Resolution of 1952. Briefly, they are direct and general obligations of the Authority for the payment of principal and interest of which the full faith and credit of the Authority is pledged. They are secured equally and ratably with all the other Consolidated Bonds by a pledge of (1) the net revenues of the Authority from the Hoboken-Port Authority Piers, the Brooklyn-Port Authority Piers, the Port Authority-West 30th Street Heliport, the Erie Basin-Port Authority Piers, The Elizabeth-Port Authority Pier (under construction), the Port Authority-Downtown Manhattan Heliport, and any additional facilities which may hereafter be financed or refinanced in whole or in part through the medium of Consolidated Bonds, (2) the Port Authority's existing six bridges and tunnels, two union motor truck terminals, bus terminal, grain terminal, and Inland Terminal No. 1, subject only to the pledge heretofore made of such revenues in favor of General and Refunding Bonds, (3) the Port Authority's existing four air terminals, subject to the pledge heretofore made of such revenues in favor of Air Terminal Bonds, (4) Port Newark, subject to the pledge heretofore made of such revenues in favor of Marine Terminal Bonds, (5) the General Reserve Fund of the Authority equally with other obligations of the Authority, and (6) the Consolidated Bond Reserve Fund established in connection with Consolidated Bonds.

Debt Service Requirements: The Authority's bonds are partly serial and partly callable term bonds redeemable

Excerpt from Exhibit P-1

according to their terms from mandatory sinking fund payments. Serial maturities and sinking fund payments extend to 1991. After peak total debt service of $42,161,000 in 1962, including requirements on the bonds now offered, debt service trends downward gradually over the life of the bonds with only minor exceptions. Debt service requirements over the next 10 years, including amortization and interest, are shown in Table 1.

Coverage for Debt Service: The Authority's earnings provide ample coverage for debt service on all bonds, including those now offered. Net revenues in 1960 totaled $73,970,000, including income on investments and after security valuation adjustments, and covered interest payable in 1960 5.57 times and principal and interest 2.40 times. Net operating revenues, before income on investments and security valuation adjustments, totaled $62,682,000 and covered interest payable in 1960 4.72 times and principal and interest 2.04 times. Net operating revenues in 1960 would provide coverage on maximum interest payable in 1962, including the new issue, 3.01 times and on maximum total debt service payable in 1962, 1.49 times. Net operating revenues for the 12 months to September 30, 1961, would provide coverage on maximum interest 3.06 times and maximum total debt service 1.52 times.

Facility Usage: Traffic using various of the Authority's facilities is shown in Table 2, in each case for the last three twelve month periods ending September 30. For the 12 months ending September 30, 1961, vehicular traffic on the bridges and tunnels was down 2.0%, air passenger traffic was down 2.6%, plane movements down 5.2%, number of marine vessels up 5.0%, and waterborne tonnage down 1.9%. A number of factors account for these trends, but probably the most important single cause of the declines

Excerpt from Exhibit P-1

was the economic recession that dominated much of the 12 month period to September 30, 1961. Bad weather early in 1961 also depressed traffic at many of the facilities. In the case of some individual facilities, such as LaGuardia Airport, declines also reflect shifting traffic patterns within the area, in this case because of rehabilitation of the facility. Declines in the number of plane movements additionally are accounted for by airline utilization of larger planes. In any case the declines during the period were overall moderate in extent and temporary in duration. With the general upturn in business conditions, facility usage can be expected to resume an upward trend.

Financial Operations: Financial operations of the Authority over the last three calendar years, 1958 through 1960, were discussed in our report on the Authority dated April 20, 1961. Financial operations for the last three 12 month periods ending September 30, 1959 through 1961, are shown in Table 3.

Financial Position: The Authority's fund position remains strong. At the end of 1960 the Authority showed over $1.0 billion invested in facilities, against which it had funded debt totaling $610,827,000. Reserve funds totaled $79,065,000, distributed by fund as follows: General Reserve Fund, $61,082,000; Special Reserve Fund, $12,512,000; Air Terminal Reserve Fund, $4,468,000; and Marine Terminal Reserve Fund, $1,001,000. At December 31, 1960 the Authority showed total assets of $1,214,095,000, up from $1,112,476,000 at the end of 1959. The financial position of the Authority at September 30, 1961, as reported in its quarterly statements, is briefly summarized in Table 4.

Additional Facilities: The Authority is currently engaged in studies for improvements and other new construction

Excerpt from Exhibit P-1

in addition to programs now in progress. Among these are the following: (1) The Authority made a definitive report to the Governors and Legislatures of the two states in May 1961 indicating a need for an additional major airport to serve the future needs of the metropolitan area. No positive action has been taken. The Authority has no present power to construct or acquire such a facility, if it is to be located outside the Port of New York District nor to acquire any real property for a new airport at any location. (2) The Authority submitted a report dated March 10, 1961, to the Governors of New Jersey and New York and the Mayor of New York City "for their consideration and determination of any further action they may wish to direct toward the establishment of a World Trade Center in the Port of New York." The study found a proposed World Trade Center economically feasible and proposed redevelopment of a 16 acre site in lower Manhattan to house public and private agencies involved in international commerce. New York enacted legislation in 1961 to permit effectuation of this program and acquisition by the Authority of the Hudson & Manhattan Railroad, provided New Jersey enacted identical legislation. New Jersey enacted legislation permitting acquisition of the H&M but failed to include legislation pertaining to the World Trade Center. Recent press reports indicate that New Jersey is regarding much more favorably the proposal to tie the two projects together as a single undertaking but with the change that the World Trade Center be moved from the Lower East Side of Manhattan to the Lower West Side. The site under consideration includes and is adjacent to the present H&M terminal and buildings. (3) The Authority is studying the possibility of acquiring and improving the Hudson & Manhattan Railroad Company. As noted, the Authority has no power to proceed with this project,

Excerpt from Exhibit P-1

or with the World Trade Center, without authorizing legislation from both states. The Authority has stated that upon due statutory authorization it might be able to sell bonds for such acquisition if investors could be given contractual assurance with statutory protection that its General Reserve Fund could not be applied to commuter rail transit deficits beyond those of the present and existing Hudson & Manhattan Railroad. It has specified additional protections necessary to insure financial soundness of the undertaking. (4) New York State has appropriated $20,000,000 to the Authority to be used in purchasing commuter railroad cars for the purpose of renting them to commuter railroads operating between municipalities in New York State. The legislation was effective September 21, 1959, and the program has approval of both states. The Port Authority could not borrow money for the purchase of such cars, however, until New York State guaranteed payment of principal and interest on the bonds. Even after authorization, the Port Authority may pledge to the payment of the bonds only the railroad cars purchased, the rentals on them, and the State liability on its guarantee. The New York Constitution was amended in 1961 to permit the New York guarantee. The Authority expects to requisition the money appropriated by New York as it is needed and hopes further to encourage a concurrent program, financed from private investment sources, to maximize the number of cars that can be purchased. The Authority expects to issue the bonds described to repay the State's appropriation and/or refund the private financing. The Authority has entered an agreement with New York Central Railroad to initiate this program, which will commence with the purchase of 53 commuter cars at a cost of over $8.1 million.

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Excerpt from Exhibit P-2

DUN & BRADSTREET, INC.

MUNICIPAL CREDIT REPORT

December 14, 1962 Revenue Service

New Issue Report: Sale 12-19-62
THE PORT OF NEW YORK AUTHORITY

Prospects: SUPERIOR. The Port of New York Authority is a financially strong, multi-purpose, bi-state agency with a long list of accomplishments. As the Authority has consolidated its financial strength and expanded its activities, it has increasingly been faced with conflicts with opposition groups in the Port District; and its public relations has become a matter of increased importance. But the Authority has highly competent management, which works within the objectives of the bi-state Compact and within the scope of authorizing legislation of the States of New York and New Jersey. The Authority continues to draw heavily on its ample earnings and on borrowed funds to finance extensive programs of capital improvements. The second deck of the George Washington Bridge was opened August 29, 1962, although additional construction work on the approaches remains to be completed. Other programs now under way include construction of a bus station in the Washington Heights section of Manhattan as a part of the George Washington Bridge improvement, redevelopment of LaGuardia Airport, continued development of New York International Airport, improvements of Newark Airport, development and improvement of the Brooklyn-Port Authority Piers, Port Newark, and the Elizabeth-Port Authority Piers, and enlargement of the Port Authority Bus Terminal and its

Excerpt from Exhibit P-2

approaches to the Lincoln Tunnel. Also the Authority is authorized to proceed with and is working toward construction of a World Trade Center in lower Manhattan estimated to cost about $270 million, and in conjunction with this project it has acquired the Hudson Tubes, an interstate electric railroad, having taken over this operation September 1, 1962, under a wholly-owned subsidiary corporation, Port Authority Trans Hudson Corporation (PATH). This is expected to continue as a deficit operation, but safeguards have been established to prevent dilution of security of the Authority's bonds. The Authority has also launched its program of purchasing commuter railroad cars for commuter railroads operating between New York State municipalities; these bonds, however, are guaranteed by the State of New York and the entire program is insulated from the rest of the Authority's financial structure.

Bond Sale: The Authority is offering for public sale a total of $25,000,000 Consolidated Bonds, Twenty-Second Series (First Installment) on December 19, 1962. Details of the bond sale are shown in Table 1.

Bonded Debt: As of November 30, 1962, the Authority had outstanding funded debt in the amount of $732,837,000 (excluding the State-guaranteed Commuter Car Bonds), and total debt including the current offering will amount to $757,837,000. The outstanding debt at November 30, 1962 included $44,987,000 General and Refunding Bonds, Series 8 through 11 and Series 15; $62,829,000 Air Terminal Bonds, Series 1 through 3; $7,276,000 Marine Terminal Bonds, Series 1 and 2; and $617,745,000 Consolidated Bonds, Series 1 through 21. By the Consolidated Bond Resolution of 1952 the Authority covenanted that no additional General and Refunding, Air Terminal or Marine

Excerpt from Exhibit P-2

Terminal Bonds would be issued, and since that time the Authority has made substantial progress toward converting the form of its debt into the Consolidated Bonds, 84% of the total bonded debt being in this category at November 30. Security for the Consolidated Bonds is described in Table 1.

Debt Service Requirements: The Authority's bonds are partly serial, and partly callable term bonds redeemable according to their terms from mandatory sinking fund payments. Serial and sinking fund payments extend out to 1993. Including requirements on the bonds now offered, total debt service is at a high of $44 million to over $45 million 1963 through 1975, the estimated peak falling in 1969 in the amount of $45,736,000. Requirements decline gradually out to the mid-1980s and thereafter decline sharply, an arrangement well designed to permit scheduling of additional bond issues.

Coverage for Debt Service: The Authority's earnings provide wide coverage on its debt service requirements. Net revenues for the 12 months ended September 30, 1962, totaled $75,874,000, which covered interest for that period by 4.83 times. Net revenues for this 12-month period would cover estimated maximum future interest due in 1963 3.18 times and estimated maximum total debt service due in 1969 by 1.66 times. This computation does not take into account growth of revenues through increased usage of the Authority's facilities or growth to be expected from opening of new or expanded facilities.

Facility Usage: For the 12 months ended September 30, 1962, vehicular traffic on the Authority's bridges and tunnels increased 6.1% over the comparable 12-month period in 1960-61. Air passenger traffic at the three commercial

Excerpt from Exhibit P-2

airports increased 10.4%, and the total of plane movements at the four airports (including Teterboro) rose 8.1%. Marine terminal traffic declined 4.7%, although waterborne tonnage registered a slight gain of 1.9% (See Table 5). Factors accounting for the changes in the Authority's traffic and usage were the economic recession that dominated the first half of 1961, bad weather early in that year, and shifting traffic patterns in the area necessitated by the expansion and improvement programs.

Financial Operations: The Authority's gross operating revenues have shown upward trends into 1962; for the 12 months ended September 30, 1962, gross operating revenues amounted to slightly less than $132.0 million. After deduction of operating expenses, net operating revenues amounted to $71,158,000, and with the inclusion of interest earned on investments, total net revenues were $75,874,000. Net operating revenues for this period equalled 53.9% of gross operating revenues (See Table 4).

Financial Position: The Authority maintains a strong fund position. At the end of 1961, the Authority had over $1.1 billion invested in facilities, while funded debt totaled $626,093,000. Debt retired through the end of 1961 amounted to $538,630,000. Reserve funds at December 31, 1961, totaled $82,412,000, made up of $62,609,000 in the General Reserve Fund, $13,305,000 in the Special Reserve Fund, $5,376,000 in the Air Terminal Reserve Fund, and $1,121,000, in the Marine Terminal Reserve Fund. Total reserves were held $81,588,000 invested in securities and $824,000 in cash.

Additional Programs: The Authority is proceeding with certain additional programs which it is authorized to undertake by legislation enacted by the two states. Most

Excerpt from Exhibit P-2

prominent of these are the proposed World Trade Center and the Hudson Tubes operations.

World Trade Center: The Authority has the power to proceed with this program under identical authorizing legislation passed by New York and New Jersey. This center would be an integrated facility of commerce in the lower west side of Manhattan on a site encompassing the present site of the Hudson Terminal buildings generally in an area bounded by Church Street, Liberty Street, Vesey and Barclay Streets and the Hudson River. It would bring together the government and other agencies concerned with the movement of World Trade cargo through the Port of New York. The present estimated capital cost of the program is $270 million. The Commissioners of the Port Authority have indicated that they will proceed with this facility only after establishing that it would produce revenues sufficient with adequate margin to cover annual operating and debt service costs beginning after a reasonable development period. It is expected the facility would be financed by Consolidated Bonds.

Hudson Tubes Facility: On August 28, 1962 the Interstate Commerce Commission issued a certificate authorizing acquisition and operation of the Hudson Tubes by PATH. On September 1, 1962 pursuant to order of the New York County Supreme Court, in a condemnation proceeding, title was vested in PATH to the Terminal Buildings at 30 and 50 Church Street in New York City and the balance of the railroad system formerly operated by the Hudson & Manhattan Railroad; excluded from the acquisition were property interests of other railroads, such as the Journal Square Station in Jersey City and the

Excerpt from Exhibit P-2

trackage between Jersey City and Newark. PATH and the Pennsylvania Railroad Corporation, however, entered into an agreement for continued operation of joint-train service on the same terms as the former agreement between H&M and PRR. The agreement runs to February 28, 1963. PATH commenced operations September 1, 1962.

It is expected that the program for acquiring the properties, modernizing the power and signal systems, and acquiring new cars will cost in excess of $100 million. The operation is expected to involve a continuing annual deficit for operations and debt service of about $5 million. Plans for extension of the facilities expect to enlarge the deficit. The General Reserve Fund or other available revenues or reserves are applicable to these deficits under limitations described below.

The Authority's present plans call for demolition of the Hudson Terminal buildings, replacement of the terminal, and modernization of the trackage. Preliminary plans are being made for possible developing of a new Hudson Tubes station in Jersey City.

Covenant Against Security Dilution: Recognizing the deficit nature of the Hudson Tubes operation, the Authority urged the legislatures of the two states to incorporate protective features to prevent impairment of the Authority's credit. In general the protection contained in the legislation prohibits the application of any revenues or reserves pledged to the Consolidated Bonds for additional commuter railroad purposes beyond the original Hudson Tubes, unless the Port Authority shall have first certified the eligibility. To be eligible the Authority must determine either that the proposed facility is self-supporting, or if not, that at the end of the preceding calendar year the General Reserve Fund contained the full

Excerpt from Exhibit P-2

statutory amount and that for the ensuing 10 years the estimated average annual deficits of the proposed additional commuter facility and any then existing Port Authority commuter facility would not exceed an amount equal to 1/10 of the amount in the General Reserve. Certain adjustments in this figure are provided by statute to prevent the enlargement of deficit capacity, and the limiting figure may be enlarged to the extent of state subsidies for commuter railroad purposes.

Litigation: On June 26, 1962, a suit was commenced against the Authority to declare the Hudson Tubes-World Trade Center legislation unconstitutional and to enjoin the Authority from proceeding. The latter motion was denied July 17, 1962; condemnation proceedings were authorized on July 26, 1962. Further argument is being heard in the present term of the Appellate Division. Bonds now offered are stated to be not affected by these matters.

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Exhibit P-3

Memo To: William H. Morton
Robert R. Krumm

From: John F. Thompson

PORT AUTHORITY OF NEW YORK
AND NEW JERSEY

Extended Comment

The much discussed 1962 Covenant was embodied in concurrent statutes adopted by the New Jersey and New York legislatures which authorized and provided for construction by the Authority of the World Trade Center and which provided for the takeover of PATH. Section 6 in each of the statutes reads as follows:

> "The two states covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority . . . (b) neither the states nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad puposes whatsoever other than permitted purposes hereinafter set forth."

Permitted purposes include the Hudson Tubes, certain freight transportation and terminal facilities, self-supporting facilities, or facilites with permitted deficits. The

Exhibit P-3

permitted deficits are based on estimates by the Port Authority of revenues and expenditures for the ensuing ten years. The deficit of PATH is to be included. The aggregate annual deficit from passenger railroad facilities as so estimated shall not exceed 1/10 of the amount in the General Reserve Fund. There is an alternative limiting figure, namely, 1% of the total amount of bonds retired from revenues by the Authority plus the General Reserve Fund, but this is still the smaller of the two alternatives. At the end of 1973 the General Reserve Fund totaled $173.5 million plus, so the permitted estimated annual deficit would be $17 million. The deficit of PATH alone in 1973 was "more than" $20 million, so there is obviously no room here.

The provisions of Section 6 quoted above are part of the contract with holders of bonds issued between March 27, 1962 and May 10, 1973. It is generally believed by municipal bond attorneys and others familiar with this matter that the outright repeal of this section would constitute a forbidden impairment of the obligation of contracts under the federal constitution. This was one of the reasons that Governor Cahill opposed the outright repeal. If repeal were nevertheless attempted there is little doubt that litigation would be instituted on behalf of bondholders. Such litigation might well continue over a period of years, holding up Port Authority financing and projects as a result.

A second unfortunate result of attempted repeal would be the indirect effect on the credit of the two states. Through its various agencies New York State has outstanding some $4.5 billion of bonds issued by its agencies which are dependent to an unusual degree on the good faith of the state. A similar additional amount is anticipated during the years immediately ahead for state sponsored projects. Investors would consider the repeal of this covenant as evidence of bad faith on the part of the state;

Exhibit P-3

this could increase the difficulty and cost of financing these additional projects.

In New Jersey a large project has recently been financed only after addition of a reserve makeup provision commonly spoken of in the marketplace as a moral obligation. The bonds in question are not yet fully distributed. A recent article in the Commercial and Financial Chronicle suggests that holders of these bonds may, because of Governor Byrne's proposal to repeal the Port covenant of 1962, question the value of the state's moral pledge on the sports complex bonds.

Along with the pressure to repeal the covenant there are exaggerated statements about the reserves and earnings of the Port Authority which, without the covenant, could be available for mass transit purposes. If we examine the operations of the Port Authority for the last several years the annual net revenues after paying debt service on the consolidated bonds have been $70 to $75 million. This is before interest and repayments on the bank loans, which have required a major portion of net income for several years, and would continue to require most of it through 1979. This net income is a significant and impressive amount when it is considered within the framework of the current operation and debt service requirements of the Port Authority. Together with the reserve funds it provides strength and stability to the Port Authority's financial position, and its credit standing.

But if it is to be considered in the framework of the mass transit problem in the metropolitan area it becomes a very small amount. Officials recently stated that $100 million would carry the deficit of the New York City transit system only from January 1 to May 1. During the past year final legislative authorization was given to plans for rail mass

transportation improvement previously announced by Governors Rockefeller and Cahill and the Port Commissioners. Included are rail connections with Kennedy and Newark Airports (and thence to Plainfield, New Jersey), and connections facilitating direct rail access from New Jersey to Penn Station. The plans anticipate substantial federal and state capital grants, and assignment of operating deficit risks to other agencies, so that the projects can be certified as in compliance with the 1962 covenant. If the Port Authority's financial strength and credit position are to be maintained, the realities of its financial position limit incursion into the mass transit field as much as does the 1962 covenant, and the announced program presses that limit. The burden of proof is on those who push for more.

Recent assertions that mass transit development was the purpose for which the Port Authority was created are an attempt to revise history. The basic original purpose did involve transportation, that of commerce in and out of the Port of New York from other areas both foreign and domestic. The concept was for the two states to work jointly in Port developments. It was a number of years later that the Port Authority, being the most convenient bi-state body, was given the authority and responsibility for the various bridge and tunnel crossings between the states. In fact the first tunnel, the Holland Tunnel, was built by another authority and eventually refinanced and turned over to the Port Authority. On the other hand the marine terminal development has been quite in line with the Port's basic original purpose and would have been much more extensive had it not been for the obdurate attitude of the New York City government in the immediate post-war years when these developments were getting underway. Given the shift to air transportation the airport development is certainly in line with the Port Authority's original purposes. Despite all the criticism of the World Trade Center, the courts

have held that this project is a valid Port Authority purpose.

The Port Authority has been authorized and directed by the two states in each and every project undertaken, and except for PATH, the projects were expected eventually to support themselves with their own revenues. Overall the Port Authority has been expected to operate as a public business agency with revenues from the services it provides being its only source of funds. It has neither taxing power nor any kind of so-called moral obligation or reserve makeup provision providing indirect state support for its debt.

There is a wide body of opinion that in present circumstances, especially because of energy and environmental problems, government should step in to discourage auto traffic into major urban centers in favor of the greater use of mass transit. Because of its bi-state character, its efficiency in building and operating the projects it has undertaken, together with an unreal view of the relation of its earnings and resources to the needs of mass transit in the area, the Port Authority has become a focal point of demands on this score. It is submitted here that this is inappropriate. The Port Authority has functioned for the two states to finance and operate public facilities which on the whole could be supported by their own revenues. In carrying out this assignment it has to some degree used the automobile tolls from the Hudson crossings as a back-up in getting other projects underway. But if there is to be a significant shift of funds from charges imposed on automobile traffic to the support of mass transit this should be done by the two states themselves; to do this is an exercise of the state police power and taxing power. As such it should apply to all automobile traffic into Manhattan whether using the free City bridges or the Hudson crossings.

Excerpt from Exhibit P-4

(Draft memo dated 4/27/72 by John F. Thompson)

PORT OF NEW YORK AUTHORITY

Mass Transportation vs. Bondholders Security.

In 1962 concurrent statutes were adopted by the New Jersey and New York legislatures providing for the World Trade Center, for the take-over of PATH, and also providing restrictions on future activity of the Port Authority in the railroad field. These restrictions are found in sections six in each of the statutes. Here the two States covenant; (1) not to diminish or impair the power of the Port Authority to establish, levy and collect rentals, tolls, fares, fees or other charges for facilities of which the revenues have been pledged to the bonds; and (2) that the Port Authority will not apply any such revenues for "any railroad purposes whatsoever other than permitted purposes hereinafter set forth." Permitted purposes include the Hudson Tubes, certain freight transportation and terminal facilities, self-supporting facilities, or facilities with permitted deficits. The permitted deficits are based on estimates by the Port Authority of revenues and expenditures for the ensuing ten years. The deficit of PATH is to be included. The aggregate annual deficit from passenger railroad facilities as so estimated shall not exceed 1/10 of the amount in the General Reserve Fund. There is an alternative limiting figure, namely, 1% of the total amount of bonds retired from revenues by the Authority plus the General Reserve Fund, but this is still the smaller of the two alternatives. At the end of 1971 the General Reserve Fund totaled $144 million plus, so the permitted estimated annual deficit would be something over $14 million. The deficit of PATH alone in 1970 was $13 million and in 1971 was reported to be $16 million, so there is obviously no room here at all.

Excerpt from Exhibit P-4

The text of the discussion of the covenant against additional passenger railroad deficits from the most recent official statement is attached hereto, as is the text of section six of the 1962 concurrent acts of the two legislatures.

The present covenant to charge adequate tolls and other charges is found in section 12 subdivision F of the Consolidated Bond Resolution and reads as follows: "To establish and collect flight fees, wharfage, dockage, rents, tolls and other charges in connection with facilities the net revenues of which are pledged as security for Consolidated Bonds, to the end that at least sufficient net revenues may be produced therefrom at all times to provide for the debt service upon all Consolidated Bonds."

Turning to the possibility that the bondholders be approached for a modification of the Resolution, the procedure to obtain such modification is found in section 16 of the Consolidated Bond Resolution adopted October 9, 1952. The text of this procedure for modifications is also attached hereto. This procedure requires that a *meeting of the holders* of consolidated bonds be called for the purpose of considering any such proposed amendment, repeal or modification. Broad publication of the notice of such a meeting is required,—once a week for four weeks in papers not only in New York but also in Boston, Philadelphia, Chicago and San Francisco. Notices are also to be mailed to the holders of registered bonds. To qualify to vote at such a meeting the holder of a consolidated bond or his proxy must present at the meeting his bond or bonds, or a certificate of ownership from a Registrar or such Bank or Trust Company satisfactory to the Authority as has accepted such bonds against receipt and certificate of ownership, which shall entitle the holder to vote at the meeting. 60% of the aggregate principal amount of outstanding consolidated bonds, exclusive of Authority-

Excerpt from Exhibit P-4

owned bonds, is necessary to constitute a quorum at the meeting. Approval of the proposed modification also requires the consent of 60% of the aggregate principal amount of the bonds. The modification is in the form of a proposed resolution presented at the meeting. Voting at the meeting shall be by ballot. There are provisions that the meeting may be adjourned from time to time in order to obtain a quorum, but at some point it appears that holders of at least 60% of the outstanding bonds either in person or by proxy must be present at the meeting and vote favorably for the modification.

The percentage approval required is lower than that for the Triborough, but the meeting procedure adds further complexity and difficulty to the process of obtaining approval. In my opinion an approach to the bondholders for a modification of the 1962 restrictions accompanied by a moderate increase in interest rate on their bonds would fail, partly because it would be unacceptable and partly because of the procedural difficulties.

It is suggested that in the alternative consideration be given to measures assisting mass transportation which can be developed within the present framework and covenants with the bondholders. One such proposal would be concurrent action by the States to place an override toll of 50% or more on the tolls now collected for the tunnels and bridges. This additional toll revenue could be turned over to the States in such proportion and on such terms as agreed to for use in assisting mass transit facilities. It could be said of course, that the added toll would reduce the traffic on these facilities somewhat and therefore reduce the revenue from the present tolls which is pledged to payment of the bonds. As an answer to this it could be provided that some part of the override toll proceeds be

Excerpt from Exhibit P-4

pledged to insure that gross pledged revenues from tolls not decline. The base could be total tolls collected in the most recent year, or an average of several years. Such an arrangement could protect the bondholders' rights on a realistic and fair basis, and at the same time provide for assistance to mass transit.

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Exhibit P-5

[LETTERHEAD OF]
W. H. MORTON & CO.

June 10, 1974

Mr. Norman T. Hurd
New York State Executive Office
1350 Avenue of the Americas
New York, New York 10019

Dear Mr. Hurd:

All in the group who met in your office on Friday to discuss the adverse effect of repealing the 1962 Port Authority covenant join me in thanking you for your courtesy and consideration. As in any such discussion a few after thoughts occur which were not expressed at the time, and we would like to share these with you.

We are less than impressed by the "unanimous vote" in the legislature. Some of us fully understand the short roll call on the first run through of a day's calendar and feel that the "vote" indicates no more than a passive acquiescence in a leadership decision to "leave it to the Governor."

It is true that the impact on the "moral obligation" financing after Governor Rockefeller signed the 1972 repeal bill was minimal. However the conciliatory message and the fact that Governor Cahill was not persuaded to support retroactive repeal provided a setting far different from that today when Governor Wilson's action will be final and decisive.

Concerning the New Jersey Sports Complex financing, we fully agree about the impact of its questionable public purpose. It should also be said, however, that no one we know in the investment community believes the issue could

Exhibit P-5

have been sold at all if Governor Byrne had recommended repeal of the Port Authority covenant a week before instead of a week after the date of the sale, — this because of the impact on investor evaluation of the State's moral pledge.

If the New York repeal bill is vetoed there will be a continued effort in the investment community working with the Port Authority to further its involvement in mass transit within the covenant, including a possible request for bondholder consent to change. If the repeal bill is signed, however, all of this potential effort will unfortunately have to be channeled into the mobilization of investors to uphold the covenant in the long constitutional court battle which will ensue.

Again, please accept our thanks for the courtesy you accorded us in Friday's meeting.

Sincerely yours,

JOHN F. THOMPSON
President
The Municipal Forum of New York

JFT:me

cc: Mr. Alan Weeden
Mr. Truxton B. Pratt, Jr.
Mr. Amos T. Beason
Mr. R. Fenn Putman

Exhibit P-7

THE DAILY BOND BUYER
FRIDAY, MAY 17, 1974

MUNICIPAL BOND CLUB OF NEW YORK
EXPRESSES CONCERN ON REPEAL

The following statement was issued yesterday by the Municipal Bond Club of New York:

"The Municipal Bond Club of New York wishes to express its deep concern regarding recent events affecting the Port Authority of New York and New Jersey. On April 30, 1974, Gov. Brendan T. Byrne signed legislation removing a covenant between the State and the Authority's bondholders. Such covenant, granted in 1962, provides certain limitations regarding the Authority's activities in commuter railroad projects. Within the same week, both legislative houses of the State of New York also approved passage of a parallel bill.

"Members of the Municipal Bond Club have relied on the Authority's representation regarding this covenant for the past 12 years, both in their capacity of underwriting the Authority's securities and in placing such securities with private and institutional investors. The removal of the covenant may very well be a breach of the bondholders' contract and adversely affects the investment quality of the Authority's securities. It is the opinion of a substantial majority of the Municipal Bond Club's membership that the Authority will be restricted in its ability to finance any of its projects until the situation regarding the covenant is resolved, either by judicial decision or by legislative reinstatement of the covenant.

"That additional extended and/or improved commuter railroad projects are needed in New Jersey and New York

Exhibit P-7

is recognized by the Municipal Bond Club membership. The membership is confident, however, that other ways exist for the Port Authority to finance such facilities without jeopardizing the Authority's future ability to finance all aspects of its programs or cause a monetary loss to those who have provided funds in the past for the Authority's presently existing facilities. The 1962 covenant foresaw potential future need for additional commuter railroad facilities and permits the issuance of Authority bonds for such purposes, subject to initially discharging certain financial responsibilities meeting certain financial tests.

"Especially in the light that removal of the covenant apparently is not required to accomplish the goal of providing needed commuter facilities, the Municipal Bond Club has a deep apprehension concerning other programs of the two States. Specifically, if the two States, in harmony, can remove a portion of a contract as strong as a covenant, it puts in doubt the so-called "moral pledge" placed upon hundreds of millions of bonds issued by agencies of the State of New Jersey and placed upon billions of bonds issued by agencies of the State of New York.

"We have a very real and strong concern regarding the already realized loss in market value of the Authority's bonds which our members, in good faith and reliance on the Authority's statements and on the two States' contractual commitments, have sold to investors. We also are very much concerned about the future financing capabilities not only of the Authority, but of many other agencies of each of the States of New Jersey and New York."

Exhibit P-10

SECURITIES INDUSTRY ASSOCIATION
NEWS RELEASE

contact: Bruce M. Spence
Director of Public Finance
Securities Industry Association
(212) 425-2700

FOR IMMEDIATE RELEASE

NEW YORK, N.Y., May 15—The following statement was issued today by the Public Finance Council of the Securities Industry Association:

The Public Finance Council of the Securities Industry Association deplores the action taken by the legislatures of New Jersey and New York to repeal the 1962 Covenant concerning Port of New York Authority expenditures for rail mass transit. In 1962 concurrent legislation adopted by the States authorized the World Trade Center and the takeover of the Port Authority Trans-Hudson (PATH), and included the following in Section 6: "The two states covenant and agree with each other and with the holders of any affected bonds" . . . that no pledged revenues shall be applied . . . "for any railroad purposes whatsoever other than permitted purposes." This covenant served to maintain the strong credit standing and the borrowing power of the Port of New York Authority, and $1.2 billion bonds were issued under it and sold to investors between March 1962 and May 1973.

The legal strength of State, Municipal and Authority credit over the years has been importantly based on (1) the rule that the statutes under which bonds are issued are an integral part of the bond contract and (2) Article I Section 10 of the Constitution of the United States which provides

Exhibit P-10

that "no State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." The proposed repeal of the 1962 Covenant is a challenge to both, and thus constitutes a threat to the foundations of municipal credit generally. Repeal would doubtless be followed by extended litigation under the impairment clause, bringing Port Authority financing and projects to a halt.

Both of the States are heavy borrowers, and much of the borrowing for State projects is based on a debt service reserve make-up clause embodied in the statutes under which the bonds are issued. These bonds and their acceptance by investors are dependent to an unusual degree on the good faith of the State. Investor concern expressed to members of this council indicates that repeal will have an especially important adverse effect on this type of financing, and that none of the borrowing by New York and New Jersey will remain entirely unaffected.

Whatever public purposes are to be served, such as mass transit in this case, we are confident that more can be accomplished by working within the constraints of binding commitments than by adopting their unilateral revocation. Public credit depends in a large measure on the good faith of government officials and legislative bodies. Measures such as the proposed repeal are destructive of investor confidence and thus of public credit; the most certain effect is to impair the ability to finance future public projects.

Excerpt from Exhibit P-36

FINANCIAL CONDITION AND FUTURE PLANS
of
THE PORT OF NEW YORK AUTHORITY

By
AUSTIN J. TOBIN
Executive Director
THE PORT OF NEW YORK AUTHORITY

an address before

THE MUNICIPAL FORUM OF NEW YORK
THE MUNICIPAL BOND CLUB OF NEW YORK
AND THE BOND CLUB OF NEW JERSEY

April 4, 1962

• • •

"And now, as to the Hudson & Manhattan:

"The Authority's credit was built and rests today upon the confidence of those who buy our bonds that no project would ever be undertaken which, in the judgment of the Board, would impair the Authority's credit standing or weaken the investment status of our Consolidated Bonds. Any attempt to drain our revenues and reserves into the endless and increasing deficits of the commuter railroad systems of New York and northern New Jersey would obviously have violated this pledge, destroyed our credit and so ended our usefulness to the people of the Port District.

"Yet the rail commuter problem is of the most serious public consequence and throughout the years we have studied it ourselves, advanced funds for its study by others, and sought to find some area of the problem, or some basis for extending our help, or for such limited assistance as

Excerpt from Exhibit P-36

could be extended, without injury to our credit and within the intendment of our pledges and our financial commitments.

"Thus it was that the commuter equipment purchases in New York were financed by a combination of New York State advances, and now by special Port Authority securities guaranteed by the State of New York.* The State

* "In 1959, a plan was developed by the State of New York to provide financial assistance for the purchase of new railroad commuter cars to replace obsolete equipment now in service on the New York Central, New Haven and Long Island Railroads. This program sought to solve one of the major problems which prevent a more efficient and comfortable commuter railroad service in New York. The Port Authority was named to administer the program for the State.

"Under legislation enacted by the States of New York and New Jersey, the Port Authority is authorized to purchase the railroad cars for lease to the three railroads on behalf of the State of New York.

"The bi-state legislation authorizes the Port Authority to issue a special series of bonds to be known as "New York State Guaranteed Commuter Car Bonds," which will be guaranteed as to principal and interest by the State of New York.

"The New York Legislature on March 28 of this year gave final approval to a bill implementing the constitutional amendment that places $100,000,000 of New York State's credit behind the special bonds that will be used to finance the new rail commuter cars.

"Thus, while the Port Authority will issue these special bonds as agent for the State of New York, the Authority's credit, revenues or reserves are in no way involved or pledged, in whole or part, in this financing.

"The Port Authority has worked intensively with the railroads, the New York State Director of Transportation, car manufacturers, the Interstate Commerce Commission and other interested parties to complete the development of the program, including the development of design specificiations for efficient, economical and comfortable commuter cars.

"In May 1961, an $8,165,012 contract was awarded for the purchase of 53 electrically powered, air-conditioned commuter cars for use by the New York Central Railroad. The contract awarded to the Pullman-Standard Division of Pullman, Inc., provided for the delivery of all cars under the contract during 1962. The first car delivered

Excerpt from Exhibit P-36

Report upon which this program was based concluded that this arrangement was "necessary because the Port Authority has no revenues or reserves which can be applied to this purpose."

"Early last year, the Commissioners advised the New Jersey Legislature that if sound statutory limitations and assurances could be worked out, it would be possible for the Authority to finance the acquisition, modernization and operation of the Hudson & Manhattan Railroad. Vice Chairman James C. Kellogg, III, said to the Legislature:

> "On this estimate of the H&M's losses, and if we are able to satisfy prospective investors by statutory assurances that this proposal will not involve the Authority's General Reserve Fund in any other or further commuter deficit operations, ***we believe we can conscientiously certify, as we must under our indentures, that this financing will not impair the Port Authority's credit. . ."

"I think it is most significant to our bondholders to have been assured directly by the Governors of the States, and by the two State Legislatures, as they have been in the legislation just enacted, that the revenues and reserves on which bondholders have relied in the past are to be safeguarded in the future, and to be further assured by the two States that the Authority's limited participation in commuter rail transit will be kept within boundaries that will not impair the Authority's credit.

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under the program was formally dedicated in ceremonies at Grand Central Terminal by Governor Rockefeller on March 22.

"On February 28, 1962, a second lease was concluded by the Port Authority on behalf of New York State. This lease was with the Long Island Rail Road and provided for the purchase of a maximum of 60 commuter cars (generally similiar to the New York Central cars) by the Port Authority for lease to that railroad."

Excerpt from Exhibit P-36

"The limitation included in the H&M legislation constitutes a legally enforceable contract between the two States and our bondholders. The two States have pledged that Port Authority revenues and reserves will not be committed to H&M extensions or any additional commuter rail projects if our estimated deficits from such proposed rail projects, after debt service, together with the deficits of the H&M and any other commuter rail facilities for which the Port Authority General Reserve is pledged, would exceed an amount equivalent to ten per cent of the amount in the General Reserve Fund. I cannot overestimate the significance of this statutory guarantee. It protects the investment status of the Authority's outstanding bonds and gives assurance of the continuation of the Authority's sound credit position. For, under this guarantee, the two States have safeguarded the Authority's bondholders against dilution of their security by any additional deficit passenger rail facilities beyond the limits carefully spelled out in the statutes."

"Today, the Authority's General Reserve Fund totals $62,600,000. This means that, under the terms of the foregoing limitation, the Commissioners of the Port Authority cannot commit themselves to any extensions of the H&M or any other deficit passenger rail operation if any such extension, together with the existing H&M, would involve us in estimated annual losses beyond 6¼ million dollars. It appears that within a few years, because of our capital requirements and borrowings, the General Reserve Fund may be in the neighborhood of $100,000,000. At that stage, the limiting figure for commuter railroad deficits would be $10,000,000. Our present estimates indicate that the total deficit which we could incur in the

Excerpt from Exhibit P-36

operation of the Hudson & Manhattan Railroad, including additional transfer points in New Jersey, will fall within this statutory limitation. It should be noted also that, at that time, our forecast net revenues *after* mandatory debt service will be some $53 million.

"We believe that the Commissioners of the Port Authority will have no difficulty in holding their annual deficits on these Hudson & Manhattan operations within the prescribed limit of ten per cent of the General Reserve. In making the ten-year projections provided by the statute (i.e., for the initial statutory certification before we could increase our rail commutation involvement beyond the basic structure of the existing Hudson & Manhattan Railroad), allowances will, of course, be made for cost increases and other inflationary pressures. Furthermore, the States recognized the need to assure investors of the Port Authority's ability to control the commuter rail deficits for which it will be responsible and they, therefore, covenanted in the statute that a) they will vest in the Port Authority the sole authority to establish fares and to determine the quality and frequency of service, and b) provide that fares and the extent of service will not be reviewable by the state Public Service Commissions. Interstate fares will be subject to ICC reviews.

"The physical proposals for the Hudson & Manhattan tubes will be of particular interest for those of you who are Jersey commuters. The plan involves the complete replacement of the Hudson & Manhattan rolling equipment, except for the 50 newer cars which were purchased in 1958. We will replace the rest of their equipment, which is entirely obsolete, with about 250 new, fast, comfortable, air-conditioned cars. We will also have to renew the H&M's power system, signal system, switching and controls and certain trackage.

Excerpt from Exhibit P-36

"The combining of these two new projects also includes plans for a completely new terminal here in Manhattan, since we are tearing down the old Hudson Terminal Buildings, 30-50 Church Street. The reconstruction of the terminal will, incidentally, give us an opportunity to redesign the trackage there so as to modify the present restrictive curves that hamper operations in the present terminal.

"The general plan for the long-range improvement of the Hudson & Manhattan includes the provision of transfer stations in the Jersey Meadows which would provide a convenient transfer between the H&M and all of the northern New Jersey commuter railroads, except the Northern Branch of the Erie-Lackawanna. Under this plan, commuters from almost every point in northern New Jersey could transfer either to the Hudson & Manhattan for downtown destinations or to the Pennsylvania Railroad for midtown points.

"These two new projects will cost a great deal of money —at the present time, we estimate their total cost substantially in excess of $420 million. In the order of two-thirds of this amount will be devoted to the World Trade Center. That part of the financing will be based upon our conclusion and demonstration that the World Trade Center will be self-supporting and that our over-all operation, including all existing facilities, as well as the World Trade Center, will be sufficient to assure the continuance of our strong financial position and earnings record. The statutory limitation in the Hudson & Manhattan legislation which I have outlined will also assure our investors that this limited assumption of commuter deficits will be adequately safeguarded and contained.

"Beyond this particular statutory limitation, I think that I should briefly review the Port Authority's other and

Excerpt from Exhibit P-36

established financial pledges, commitments and contracts with bondholders, with which you are familiar but which, because of their importance to bond buyers, can always bear repetition.

"Essentially, Port Authority Consolidated Bonds—the only medium of financing used since 1952—are secured as follows:

1. By an irrevocable pledge of the net revenues of all the existing facilities, subject only to the lien of certain prior bonds which are no longer issuable and are in the process of being retired.

2. In addition, any net revenues of any year, which exceed what is required to meet interest and principal of bonds which have a first lien on the revenues, must be set aside in a General Reserve Fund and other specific reserve funds. This General Reserve Fund must by law receive all such surplus revenues required to maintain it in an amount equal to 10 per cent of the outstanding debt. The General Reserve Fund is pledged to the bondholder and is available to meet the principal and interest on his bonds in the event any year's revenues should not be sufficient.

"Furthermore, no additional Consolidated Bonds can be issued to raise new capital except upon compliance with an earnings test which requires maximum future annual debt service to be covered 1.3 times by net revenues.

"And finally, no new facility can be brought into the family of General Reserve Fund facilities by the issuance of additional bonds unless the Commissioners of the Authority first certify that the net revenue prospects of such new facility will not materially impair our sound

Excerpt from Exhibit P-36

credit standing or the investment status of Consolidated Bonds or our ability to fulfill our commitments to Consolidated Bond holders and others.

"Looking to our future financing, after 1962 and up to 1971, we estimate that we will require approximately $494,000,000 for the continuation of airport construction and reconstruction, for new piers, docks and marine terminals and for other necessary port facilities. Adding our financial requirements over this period for the two new projects, the World Trade Center and the Hudson & Manhattan, would indicate a total requirement of almost $1 billion. We estimate that we will be able to finance about 40 per cent of this through the medium of short-term notes due at the end of each year of issuance. If this pattern of our past financing is realized, then we should be coming to market over the years 1963-1971 for about $565,000,000 in long-term bonds. This would indicate an average of only $56,000,000 a year, though I should note that the timing of major construction expenditures will be weighted in the earlier years, in which our requirements will continue at the rate of about $100 million a year, with a rather sharp decline of new financing after 1968.

"Over the next ten-year period, our preliminary estimates indicate that our net revenues will average 1.85 times our mandatory debt service, and in only two years will we experience a coverage of less than 1.8 times.

"During this ten-year period, our debt service will almost double and move up to the $75,000,000 level. However, even at a coverage of 1.80, we will be earning about $60,000,000 in net revenues after mandatory long-term debt service. This, it seems to me, offers a considerable safety factor for our bondholders.

"We have asked the consulting engineering firm of Coverdale & Colpitts to review our own ten-year forecast,

Excerpt from Exhibit P-36

including our Hudson & Manhattan and World Trade Center figures. When we come to market in the fall, therefore, to begin the financing of these new projects, we will be able to give you the additional assurance afforded by such an outside economic audit of our own figures.

"As we go forward with our financing, the Port Authority's record, the earning power of our facilities and the strength of our reserves all testify to our ability to maintain and even improve our credit and, at the same time, to carry forward this tremendous and dynamic program of public improvements.

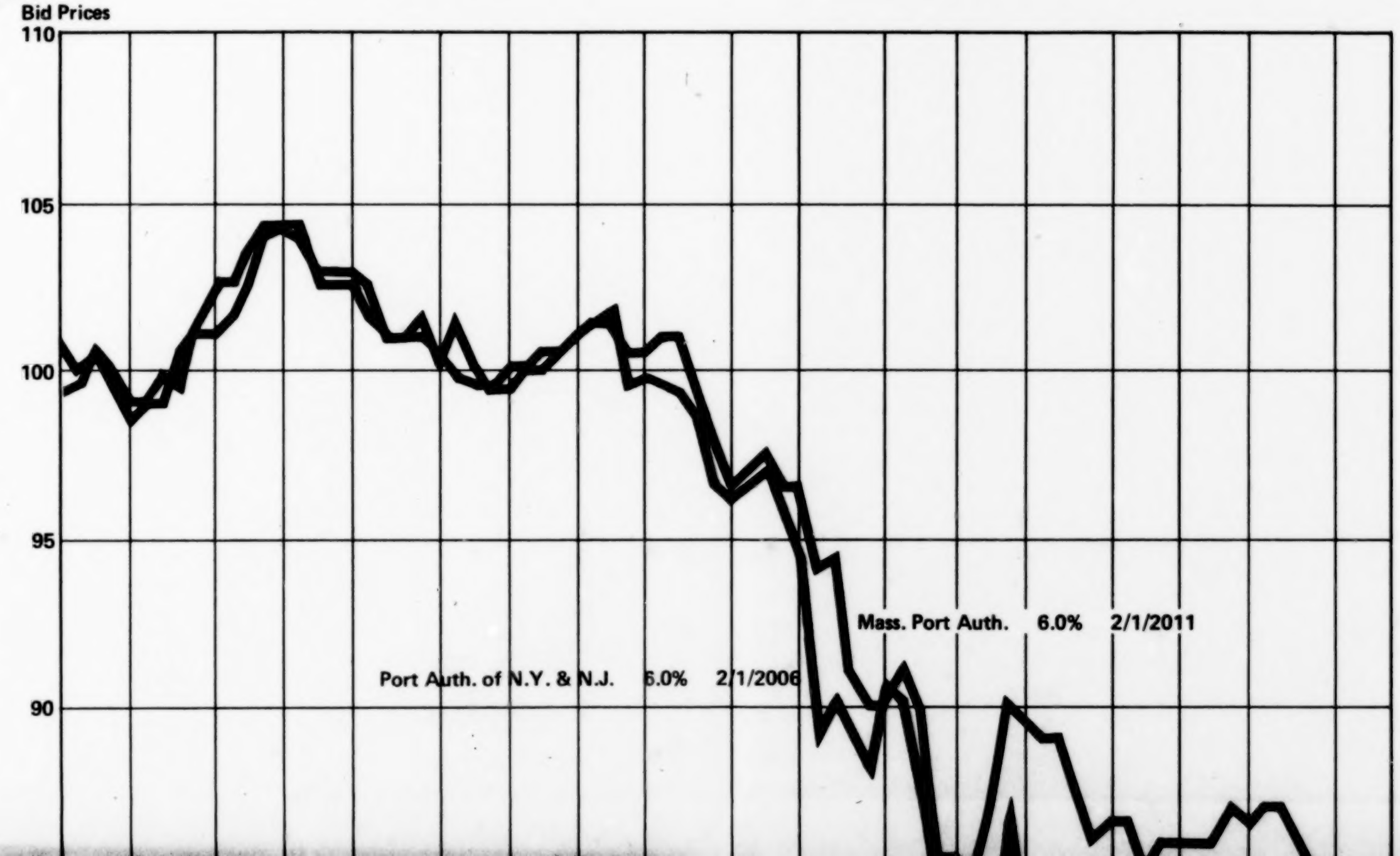
"In closing, I would ask particularly that of all the figures which have to be recited in an accounting such as this, you bear in mind our record of debt retirements—over $150,000,000 retired in the last three years alone, and no less than $374,000,000 of debt retired in the last ten years. I ask that you project that record in terms of our ability to carry forward the extensive program that I have outlined today—a program that will mean so much to the future welfare and prosperity of this great and growing Port District of New York and New Jersey."

Exhibit P-89

Exhibit P-89

COMPARISON OF DOLLAR PRICES

PORT AUTH. OF N.Y. & N.J. 6.0% 2/1/2006
MASS. PORT AUTH. 6.0% 7/1/2011



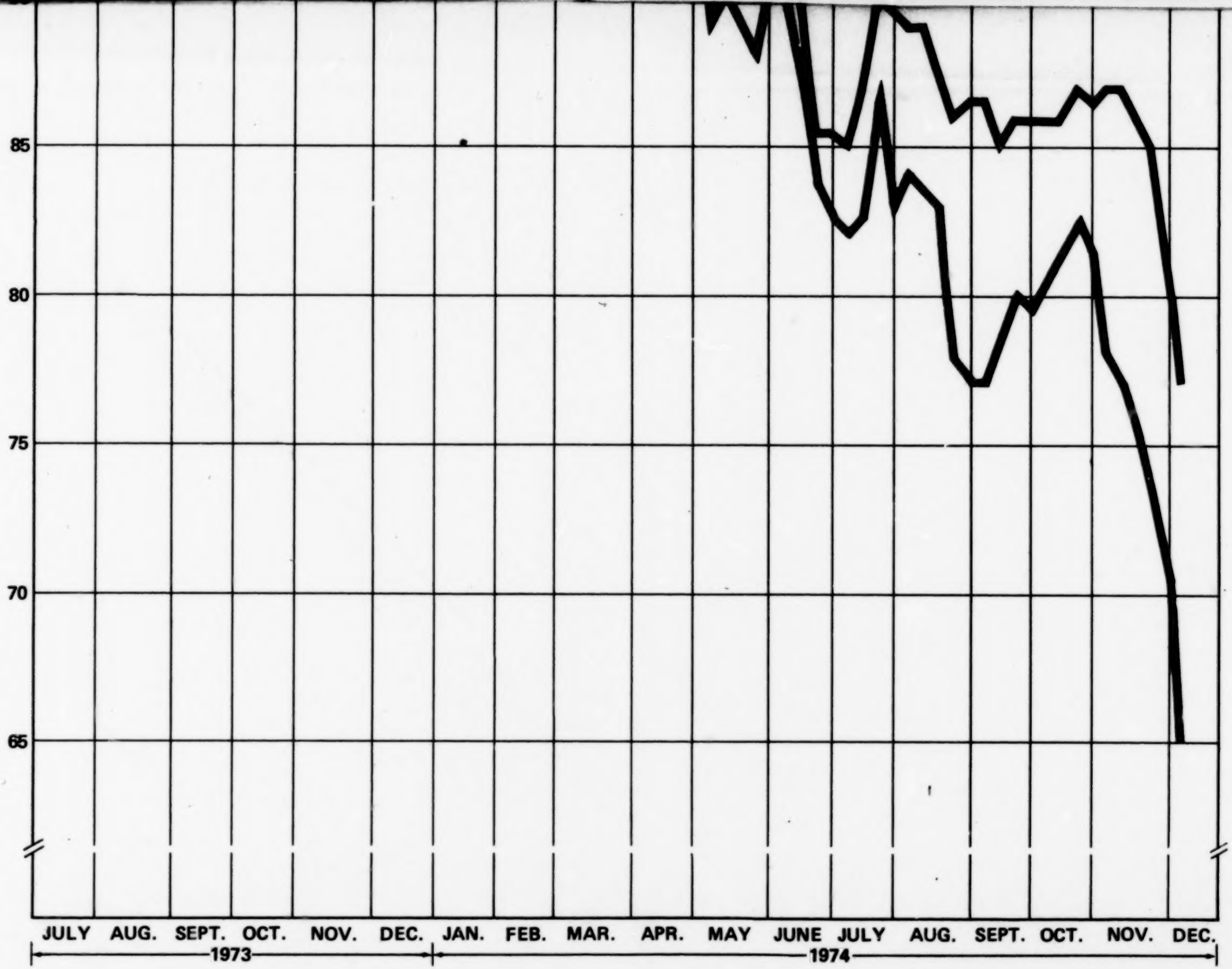

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Exhibit P-90

		Port Authorty of New York & New Jersey 6.0% 2/1/2006	Massachusetts Port Authority 6.0% 7/1/2011
1973	7/6	99¼	101
	7/13	99½	100
	7/20	100½	100½
	7/27	100	99½
	8/3	99	98½
	8/10	99	99
	8/17	99¾	99
	8/24	99½	100½
	8/31	101	101
	9/7	102½	101
	9/14	102½	101½
	9/21	103½	102½
	9/28	104½	104
	10/5	104½	104¼
	10/12	104½	104
	10/19	103½	103
	10/26	103½	103
	11/2	103½	103
	11/9	102½	102½
	11/16	101	101
	11/23	101	101
	11/30	101	101½
	12/7	100½	100
	12/14	99¾	101½
	12/21	99½	100
	12/28	99½	99½
1974	1/4	100	99½
	1/11	100	100
	1/18	100½	100
	1/25	100½	100½
	2/1	101	101
	2/8	101¼	101¼
	2/15	100¾	101¼
	2/22	99½	100½
	3/1	99¾	100½
	3/8	99½	101
	3/15	99¼	101
	3/22	98½	99½

Exhibit P-90

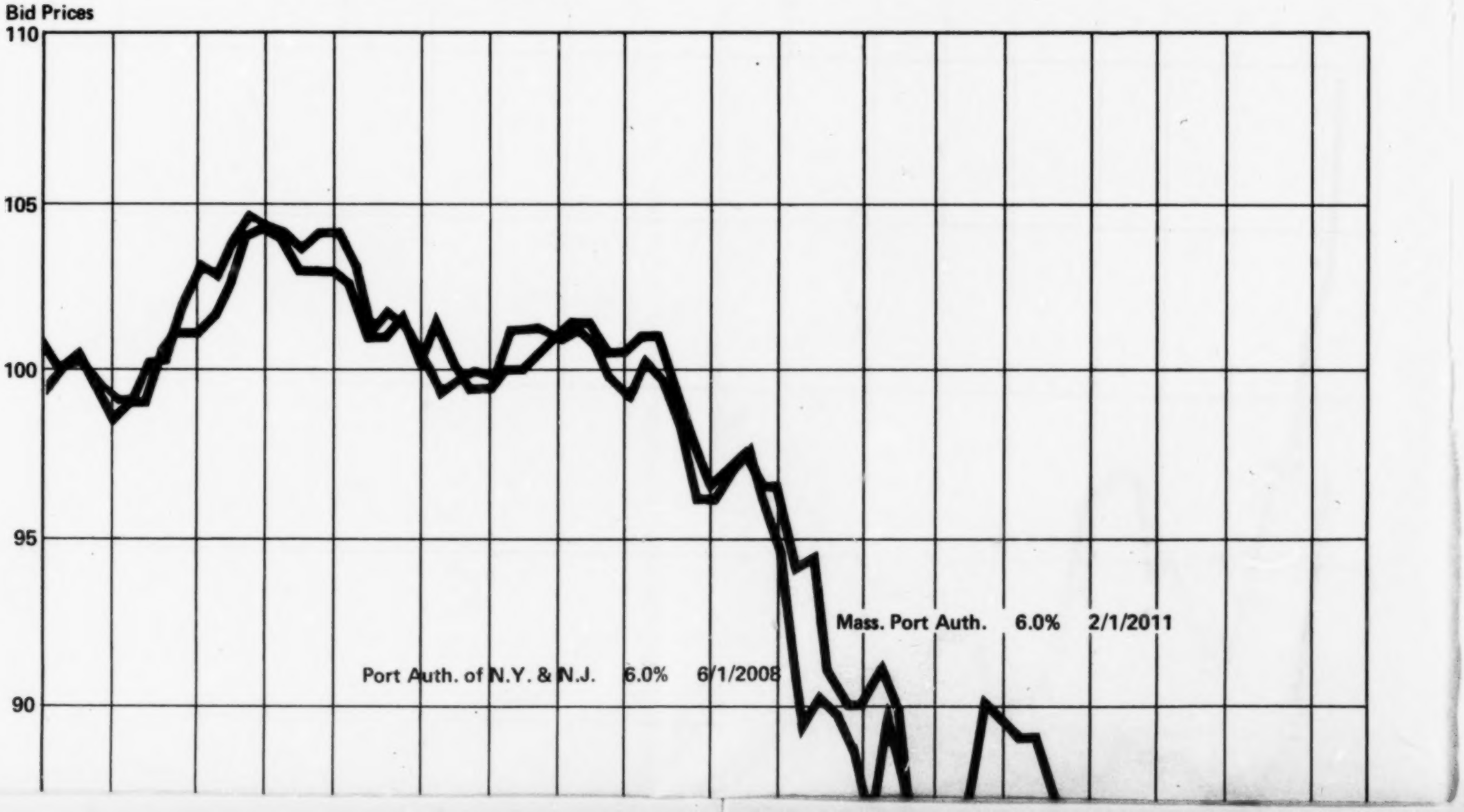
		Port Authorty of New York & New Jersey 6.0% 2/1/2006	Massachusetts Port Authority 6.0% 7/1/2011
	3/29	96½	98
	4/5	96	96½
	4/12	96½	97
	4/19	97	97½
	4/26	95½	96½
	5/3	94½	96½
	5/10	89	94
	5/17	90	94½
	5/24	89	91
	5/31	88	90
	6/7	90½	90
	6/14	90	91
	6/21	87½	90
	6/28	83½	86
	7/5	82½	86
	7/12	82	85
	7/19	82½	87
	7/26	86½	90
	8/2	83	89½
	8/9	84	89
	8/16	83½	89
	8/23	83	87½
	8/30	78	86
	9/6	77	86½
	9/13	77	86½
	9/20	78½	85
	9/27	80	86
	10/4	79½	86
	10/11	80½	86
	10/18	81½	86
	10/25	82½	87
	11/1	81½	86½
	11/8	78	87
	11/15	77	87
	11/22	75½	86
	11/29	73	85
	12/6	70	80
	12/13	65	77

Exhibit P-91

Exhibit P-91

COMPARISON OF DOLLAR PRICES

PORT AUTH. OF N.Y. & N.J.	6.0%	6/1/2008
MASS. PORT AUTH.	6.0%	7/1/2011



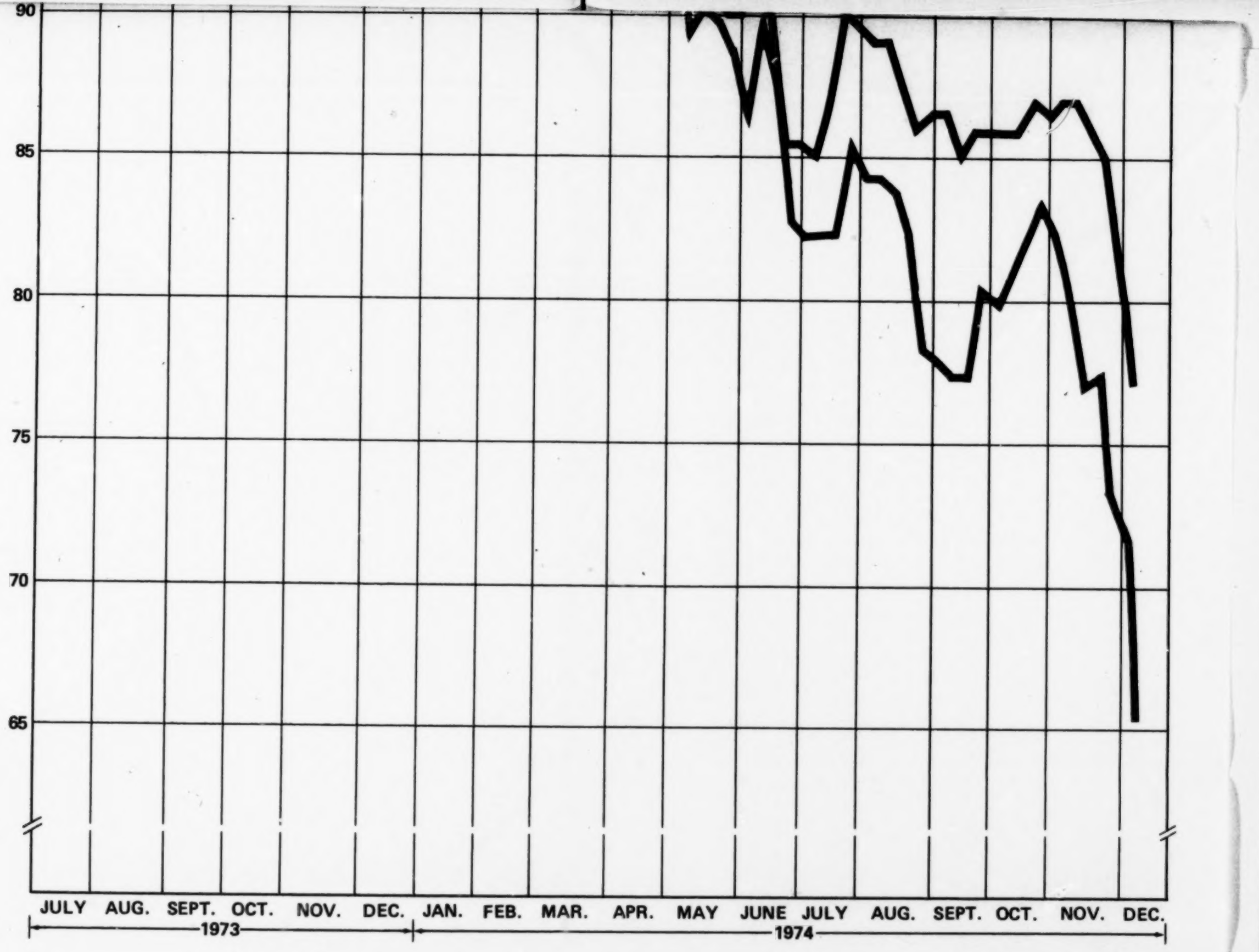

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Exhibit P-92

		Port Authority of New York & New Jersey 6.0% 6/1/2008	Massachusetts Port Authority 6.0% 7/1/2011
1973	7/6	99⅜	101
	7/13	100	100
	7/20	100⅛	100½
	7/27	99½	99½
	8/3	99	98½
	8/10	99	99
	8/17	100	99
	8/24	100⅛	100½
	8/31	101¾	101
	9/7	103	101
	9/14	102¾	101½
	9/21	103¾	102½
	9/28	104½	104
	10/5	104¼	104¼
	10/12	104	104
	10/19	103½	103
	10/26	104	103
	11/2	104	103
	11/9	103	102½
	11/16	101	101
	11/23	101½	101
	11/30	101	101½
	12/7	100	100
	12/14	99	101½
	12/21	99½	100
	12/28	99¾	99½
1974	1/4	99½	99½
	1/11	101	100
	1/18	101	100
	1/25	101	100½
	2/1	100¾	101
	2/8	101	101¼
	2/15	100½	101¼
	2/22	99½	100½
	3/1	99	100½
	3/8	100	101
	3/15	99½	101
	3/22	98¼	99½

Exhibit P-92

	Port Authority of New York & New Jersey 6.0% 6/1/2008	Massachusetts Port Authority 6.0% 7/1/2011
3/29	96	98
4/5	96	96½
4/12	96¾	97
4/19	97½	97½
4/26	95½	96½
5/3	94	96½
5/10	89	94
5/17	90	94½
5/24	89½	91
5/31	88½	90
6/7	86	90
6/14	89½	91
6/21	87½	90
6/28	82½	86
7/5	82	86
7/12	82	85
7/19	82	87
7/26	85	90
8/2	84	89½
8/9	84	89
8/16	83½	89
8/23	82	87½
8/30	78	86
9/6	77½	86½
9/13	77	86½
9/20	77	85
9/27	80	86
10/4	79½	86
10/11	80½	86
10/18	82	86
10/25	83	87
11/1	82	86½
11/8	80	87
11/15	76½	87
11/22	77	86
11/29	73	85
12/6	71	80
12/13	65	77

Exhibit P-93

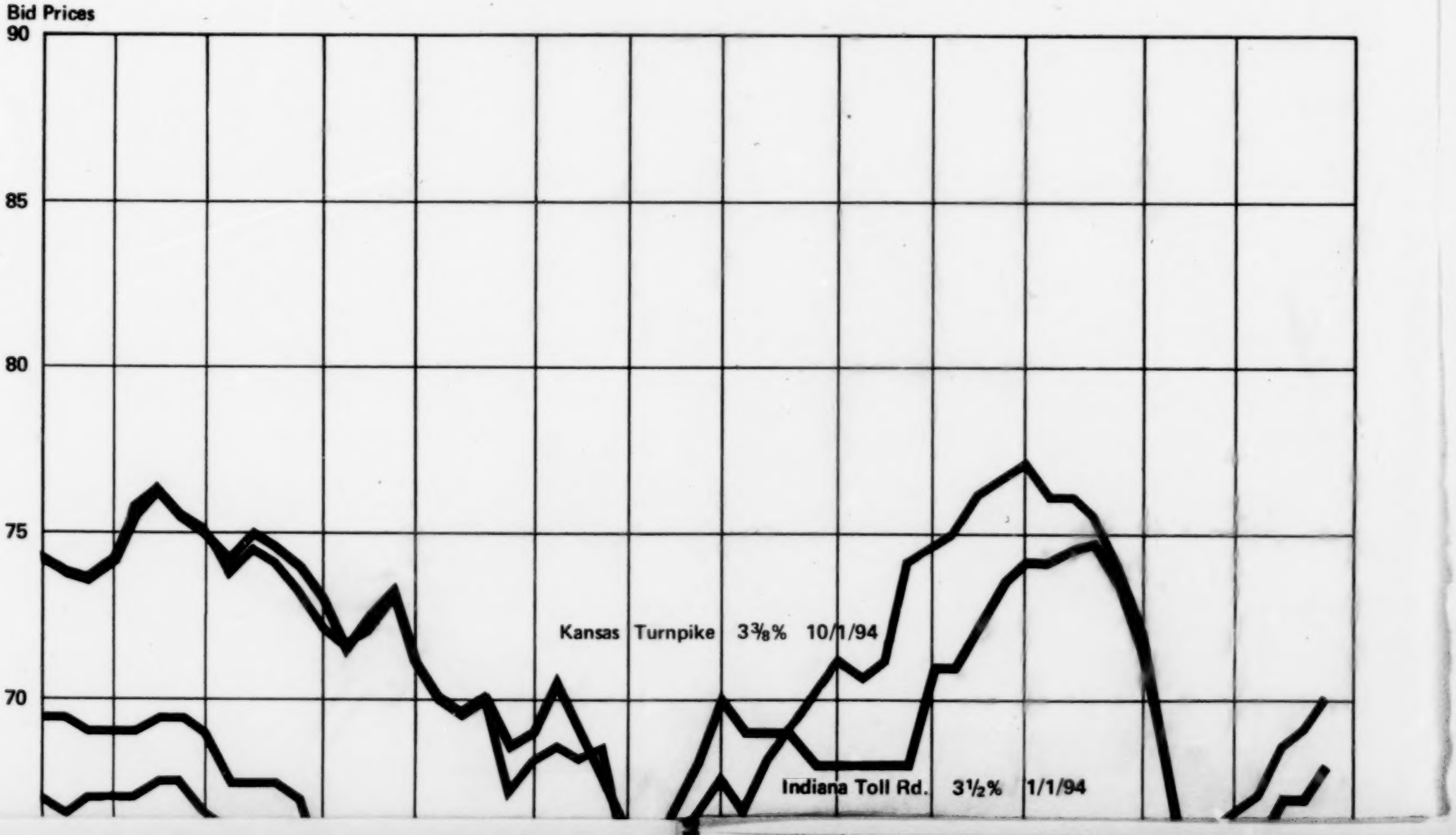
The figures used for these charts are bid prices quoted weekly from the following sources:

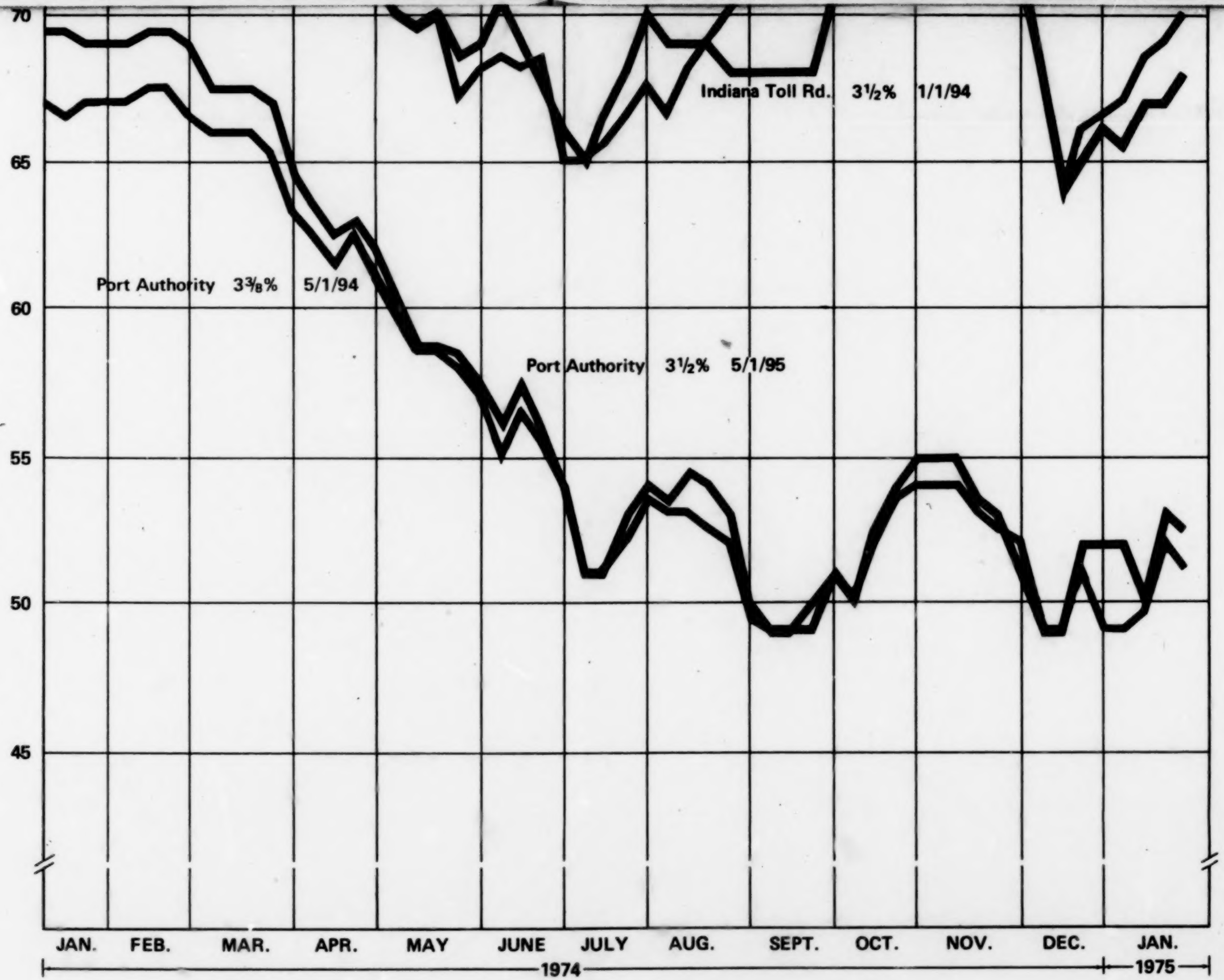
Clifford Drake		
Port Authority of N.Y. & N.J.	6.0%	6/1/2008
Mass. Port Authority	6.0%	7/1/2011
Weeden & Co., Inc.		
Port Authority of N.Y. & N.J.	6.0%	2/1/2006
Municipal Dollar Bond Average		
Supplied by Merrill Lynch from figures quoted in "The Daily Bond Buyer"		
Barr Bros.		
Kansas Turnpike	3⅜%	10/1/94
Indiana Toll Road	3½%	1/1/94
Port Authority of N.Y. & N.J.	3½%	5/1/95
Port Authority of N.Y. & N.J.	3⅜%	5/1/94

Exhibit P-94

Exhibit P-94

COMPARISON OF DOLLAR PRICES




70
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60
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45
Indiana Toll Rd. 3½% 1/1/94
Port Authority 3⅜% 5/1/94
Port Authority 3½% 5/1/95
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Exhibit P-95

		Kansas Turnpike 3⅜% 10/1/94	Indiana Toll Road 3½% 1/1/94	Port Authority of N.Y. and N.J. 3½% 5/1/95	Port Authority of N.Y. and N.J. 3⅜% 5/1/94
1974	1/4	74	74¼	69½	67
	1/11	73¾	73¾	69½	66½
	1/18	73½	73½	69	67
	1/25	74	74	69	67
	2/1	75¾	75½	69	67
	2/8	76¼	76¼	69½	67½
	2/15	75½	75½	69½	67½
	2/22	75	75	69	66½
	3/1	73¾	74¼	67½	66
	3/8	74½	75	67½	66
	3/15	74	74½	67½	66
	3/22	73¼	74	67	65¼
	3/29	72	73	64½	63¼
	4/5	71½	71½	63½	62½
	4/11	72	72½	62½	61½
	4/19	73	73¼	63	62½
	4/26	71	71	62	61
	5/3	70	70	60½	59½
	5/10	69½	69½	58¾	58½
	5/17	70	70	58¾	58½
	5/24	67	68½	58½	58
	5/31	68	69	57½	57
	6/7	68½	70½	56	55
	6/14	68	69	57½	56½
	6/21	68½	67½	56	55½
	6/28	65	66	54	54
	7/5	65	65	51	51
	7/12	65½	66½	51	51
	7/19	66½	68	53	52
	7/26	67½	70	54	53½
	8/2	66½	69	53½	53
	8/9	68	69	54½	53
	8/16	69	69	54	52½
	8/23	70	68	53	52

Exhibit P-95

		Kansas Turnpike 3⅜% 10/1/94	Indiana Toll Road 3½% 1/1/94	Port Authority of N.Y. and N.J. 3½% 5/1/95	Port Authority of N.Y. and N.J. 3⅜% 5/1/94
	8/30	71	68	50	49½
	9/6	70½	68	49	49
	9/13	71	68	49	49
	9/20	74	68	50	49
	9/27	74½	71	51	51
	10/4	75	71	50	50
	10/11	76	72	52½	52
	10/18	76½	73½	54	53½
	10/25	77	74	55	54
	11/1	76	74	55	54
	11/8	76	74½	55	54
	11/15	75½	74¾	53½	53
	11/22	74	73½	53	52½
	11/29	72	71½	51	52
	12/6	68	68	49	49
	12/13	64	64	49	49
	12/20	66	65	52	51
	12/27	66½	66	52	49
1975	1/3	67	65½	52	49
	1/10	68½	67	50	49½
	1/17	69	67	53	52
	1/24	70	68	52½	51

Excerpt from Exhibit P-202

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HUDSON TUBES FINANCING, CERTIFICATION REQUIRED BY AGREEMENT WITH BONDHOLDERS

The Deputy Executive Director reported that funds would shortly be required for Hudson Tubes purposes and recommended the application of unexpended proceeds of Consolidated Bonds, Nineteenth Series, for such purposes.

He pointed out that the Hudson Tubes will be an additional facility and that, therefore, prior to initial application, the Authority is required by covenants with its bondholders to make a certification relating to the financial effect of such financing upon the Authority. The reason for such certification requirement is that the application would, for the first time, add the Hudson Tubes to the group of facilities to which covenants with Consolidated Bondholders would apply, which covenants are secured primarily by the General Reserve Fund at this time. The Director of Finance reviewed the financial projections and data involved with respect to the Hudson Tubes and concluded that certification is in order in view of the fact that the anticipated operating deficits and debt service in connection with the Hudson Tubes represent a percentage of anticipated Port Authority net revenues available for reserves which is safely within the limits necessary to avoid impairment of Port Authority credit, or the investment status of Consolidated Bonds, or the Authority's ability to fulfill its commitments; and in view of the protections afforded in the recently enacted World Trade Center-Hudson Tubes statutes against dilution or pledged revenues and reserves by any commuter rail deficits beyond those of the basic Hudson Tubes System.

Excerpt from Exhibit P-202

Whereupon, the following resolution was moved for adoption by Commissioner Cullman, the motion being seconded by Commissioner Clancy:

> RESOLVED, that certification is hereby made that in the opinion of The Port of New York Authority application of all or any portion of unexpended proceeds of Consolidated Bonds, Nineteenth Series, Due 1991, First Installment or of Consolidated Notes, Series M, for purposes in connection with the Hudson Tubes, will not, during the period 1962 through 1991, in light of the estimated expenditures in connection with said Hudson Tubes, impair the sound credit standing of The Port of New York Authority, or the investment status of Consolidated Bonds, or the ability of The Port of New York Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds.

With the following result:

AYES: Colt, Lowe, Cullman, Clancy, Jackson, McAlevy, Martino, Stillman, Pope.

NOES: None

Carried

Whereupon, at 5:50 P.M. the meeting was adjourned.

• • •

Exhibit P-203

[LETTERHEAD OF]
THE PORT OF NEW YORK AUTHORITY

March 27, 1961

Hon. S. Sloan Colt, Chairman
Hon. James C. Kellogg, III, Vice Chairman
Hon. Howard S. Cullman, Honorary Chairman
Hon. Donald V. Lowe
Hon. N. Baxter Jackson
Hon. John J. Clancy
Hon. Joseph A. Martino
Hon. Robert F. McAlevy, Jr.
Hon. Bayard F. Pope
Hon. W. Paul Stillman
Hon. Alexander Halpern
Hon. Charles W. Engelhard

My dear Commissioner:

Mr. Stephen Wiley, Governor Meyner's Counsel, asked us to prepare an informal memorandum discussing the merits or demerits of using the 1.3 times earnings test provided for in the basic resolution governing the issuance of Port Authority Consolidated Bonds, as an alternate formula by way of a statutory assurance to bondholders, in connection with the proposed issuance of bonds for the acquisition and rehabilitation of commuter rail projects.

Accordingly we prepared and forwarded the attached memorandum to Mr. Wiley.

I think you will find it of interest, not only in setting forth the reasons why such an earnings test is unworkable, but also in summarizing the "10% of General Reserves" formula that is included in the present New Jersey Assembly Bill No. 519.

Exhibit P-203

You will be interested also in its discussion of the effect of subdivision (v) of Section 12 of Assembly 519 which in effect "unties" the statutory formula and leaves bondholders in the same exposed position that they face under the terms of the bill which has just passed the New York State Legislature (see the last paragraph on page 5).

Sincerely,

AUSTIN J. TOBIN
Executive Director

Exhibit P-203

ASSEMBLY, NO. 519

FORMULAE TO PERMIT PORT AUTHORITY COMMUTER RAILROAD ACTIVITIES

In recent legislative consideration of proposals to authorize Port Authority acquisition, operation and improvement of the Hudson & Manhattan railroad system, attention has been given to mechanisms which would preserve the Port Authority's credit and its usefulness to the States in spite of the inevitable deficit character of the Hudson & Manhattan operation and any other commuter railroad operation in the metropolitan area.

It has been recognized that the Port Authority, which cannot tax and which produces its facilities only with money freely loaned by investors, cannot undertake all of the commuter deficit railroad operations in the area, and that without assurance that it will not be called upon to do so, investors will not lend the vast sums necessary for continued port development activities which the two States may seek to achieve through the Port Authority, including commuter railroad facilities themselves.

A search has therefore turned to some formula of limitation not of the Port Authority's participation in commuter railroad activities but of limitation upon the application of revenues and reserves which have already been pledged to the holders of over six hundred million dollars of outstanding bonds.

The search has been for a formula which would protect the Port Authority's credit and yet leave it able, from time to time, to undertake such railroad commuter activities as are within its economic capability.

A mere statement of this objective shows that the answer does not lie in the 1.3 times earnings test for Port Authority Consolidated Bonds. First let us explain that test.

Exhibit P-203

Port Authority Consolidated Bonds are *open* issue bonds. That is to say there is no dollar limit upon the quantity of new bonds which the Port Authority may put out from time to time, bonds which then share all of the liens and pledges of outstanding Consolidated Bonds. These pledges include all of the Port Authority's present resources—both revenues and reserves—subject only to prior pledges in favor of older bond issues which can no longer be used for new financing.

Since a person investing in Consolidated Bonds faces such an "open end", he must have some assurance that the pledged revenues and reserves will not be diluted without limit. The bond contract therefore provides a measure for this purpose. While several alternates exist, only one has been available in practical effect. This measure is a comparison between the earnings of all Port Authority facilities and the maximum future annual debt service on all Port Authority bonds. The earnings are almost all established revenues with some small increments by way of estimate of the earnings of new facilities under construction. If the revenues equal or exceed 1.3 times the debt service figure, including debt service on the proposed new bonds, then the new bonds may be issued; otherwise they may not.

It is therefore obvious that the 1.3 earnings test sets a point of absolute stagnation for the Port Authority—the point of its uselessness to the two States. When the Port Authority can only just meet the earnings test without the debt service on any new bonds, then the Authority could not issue bonds or undertake any new projects, under its contract with the holders of its outstanding bonds.

The 1.3 Consolidated Bonds earnings test, therefore, is not a test which assures a healthy credit and an ability to handle commuter railroad deficits from existing reserves.

Exhibit P-203

For the States, a 1.3 coverage of Authority bonds would be the freezing point for their Authority's credit. Even as that point would be approached, its credit would slide rapidly toward stagnation level. While bonds may theoretically be sold without *legal* limitation, down to but not in violation of the 1.3 test, the interest rate which would have to be paid on any bonds which could be sold during such a slide toward a 1.3 coverage would increase sharply. The resulting increased debt service would, of course, push most of the proposed new facilities over the line of economic practicability. Since practically all prospective new Port Authority undertakings would, at best, be marginal, the increased debt service of any possible financing at or close to the 1.3 level would make these facilities economically impossible, even though a theoretical legal ability to issue the bonds remained.

The Port Authority's relatively favorable interest rates have been used in calculating the containable deficits of the Hudson & Manhattan Railroad, the development of Port Elizabeth, and any other new facilities or capital improvements. This program can be carried on only if the Authority can maintain the margins over the 1.3 breaking point which bondholders require to lend their money at interest rates at which future projects will continue to be economically practicable.

The whole objective of any statutory formula is to preserve the Port Authority's economic resources as against the size of commuter rail deficits in northern New Jersey and New York, i.e.—about $30,000,000 at the present time. If this can be accomplished, the States can continue to enjoy the usefulness of the Port Authority in providing needed public improvements,—including commuter railroad facilities. Prospective investors, who are free to take or leave any Port Authority bonds offered, must assume,

Exhibit P-203

in their evaluation, that any resources which the Port Authority will be permitted by the new statute to apply to commuter railroad deficits will, in fact, be so applied. The enactment of a 1.3 test would be taken by prospective investors as reflecting a legislative purpose to drive the Port Authority's net earnings down to the 1.3 level. Nothing could more surely impair the Port Authority credit which must be preserved to carry out any railroad commuter program itself, let alone the remainder of the bi-State port program.

As a matter of fact, the revenues of existing facilities have all been pledged and are not available as such for railroad commuter facility deficits. There is no legal way in which they can be applied to either the operating expenses of such railway facilities or the debt service on any bonds issued in connection therewith. It is only as revenues of existing facilities exceed the requirements for their operation and maintenance and debt service that the revenues find their way into the General Reserve Fund. It is in this form, as reserves, that the General Reserve Fund statutes and the contracts with bondholders provide a means of absorbing commuter railroad facility deficits. So long as certain contractual requirements are complied with, the General Reserve Fund *can* be applied to such railroad deficits whereas earnings of existing facilities, as such, cannot.

For this reason, any search for a rail commuter formula has been in terms of a percentage of reserves which could be applied to meet the anticipated deficits.

The present Assembly bill, A 519 (page 8) contains a formula which meets the needs of the situation in subdivision (iv) of subsection (c) of amended Section 12. (The amendment is contained in Section 6 of the Assembly bill).

Exhibit P-203

The formula lays down a condition to the application of pledged revenues and reserves to the deficits of a commuter railroad which would be proposed to be undertaken by the Port Authority. It would require the Port Authority to estimate the deficits after debt service of the group of Port Authority commuter railroads which would consist of the H&M and any other such railroads which had previously been undertaken in compliance with the formula as well as the proposed new facility. Having thus measured the likely annual commuter railroad deficit which the General Reserve Fund would be called upon to meet annually, the bill provides that the new facility can be undertaken if this deficit is not greater than 10% of the amount in the General Reserve Fund, measured, of course, on the basis of the remaining facilities of the Port Authority.

Certainly Port Authority credit could not survive bondholder apprehension that *all* of the General Reserve Fund would be siphoned off into commuter railroad deficits. The 10% figure has reality in relation to the present debt burden of the Port Authority and the prospective deficits which the Port Authority could absorb from commuter railroad operation.

Projections of the size of the General Reserve Fund based over the next decade indicate that this formula, without impairing the Port Authority's credit, would permit the application of the General Reserve Fund to commuter railroad deficits to an amount on the order of $10,000,000 per year.

It was suggested that at some time beyond the foreseeable future the General Reserve Fund might decline in amount because foreseeable Port Authority debt might be paid off without replacement by new debt incurred in the construction of new facilities. The pattern of past history suggests

that this is not likely since the expanding needs of the Port District in both States have always required new and greater financial effort by the two States through the Port Authority to keep abreast of the problems of the area. However, in case the General Reserve Fund should, nevertheless, decline without any comparable contraction in Port Authority earnings, the bill contains a safeguard which would keep the limit of permissible commuter railroad deficits in line with the Port Authority's ability to sustain them. This is done by substituting an alternate figure for the figure of the General Reserve Fund test if the former should prove higher. This alternate figure is measured by the Port Authority's equity in its vehicular bridges and tunnels and other non-railroad facilities it owns and operates augmented by the monies in the General Reserve Fund. The alternate equity figure is 1% of the amount of Port Authority debt for these facilities retired from income or reserves plus 1% of the amount in the General Reserve Fund measured by the non-railroad facilities.

The equity figure, of course, increases each year as debt is paid off so that even if the General Reserve Fund might, contrary to expectations, decline for some reason, the size of the equity will be moving in the opposite direction thus stabilizing or increasing the figure which would measure the containable commuter railroad deficit under the formula.

It must be recalled that the proposal that a self-supporting Authority should undertake perpetual deficit operations is a sharp wrench from the entire philosophy of Authority financing. The entire Port Authority debt structure, including the 1.3 test in the Consolidated Bond resolution, is based upon the theory that new debt produces new facilities and new flow of earnings into the General Reserve Fund.

Commuter railroad facilities cannot fit this pattern. They will, of course, produce new debt but they will cause a drain on the General Reserve Fund for the payment of their operating deficits and their debt service expenditures. That is why they cannot be undertaken if to do so would materially impair the investment status of the existing bonds and the Port Authority's sound credit standing.

To adapt the traditional Authority concept of self-supporting facilities to this new approach requires the most delicate wooing of private investment capital. Any blunt attempt to ignore the psychology of investors will defeat not only the existing Port program and any future Port program, but even the hope of commuter railroad operation by the Port Authority.

That is why the addition of subdivision (v) of subsection (c) of Section 12 A. 519 is such a grievous mistake. That subdivision provides that regardless of the "formula", future Commissioners of the Port Authority could go forward with any other and additional deficit commuter rail facility or facilities that they may think would not impair the Authority's credit. This, in effect, unties the "formula" and leaves the prospective investor just as badly off as he would be without any formula at all. He and his fellow investors are asked to put up some $300,000,000 of capital in reliance on a 30 year "open end" revenue bond on the speculation that five, ten, or fifteen years from now the then Commissioners of the Port Authority will resist public and political pressure to go even deeper into commuter rail deficits. As the Vice-Chairman of the Port Authority said before the Senate Commission on January 27, 1961, speaking for all the Commissioners of the Port Authority:

> "I say to you as a New Jersey Commissioner, and with all the sincerity that I can command, that there

> is nothing arbitrary or doctrinaire about this conclusion. It simply represents the realities of investment financing and the Port Authority's credit. My business is investment financing and I say to you Gentlemen that I could not sell a single Port Authority bond without such an assurance. If my responsibilities were on the other side of the table, I would not buy a Port Authority bond that did not contain such an assurance."

The Port Authority is trying to keep open the channels of investment capital which will permit the public, without taxation, to have the facilities which the two States determine are necessary for their people's needs. In order to realize the legislative program, the legislators must try to put themselves in the place of potential investors. The legislators must evaluate what will attract and what will drive away the capital needed to realize their program. They must recognize that the bonds which must be sold for the Port Authority's program are competing with tax supported bonds which the states and municipalities in this area and other areas are themselves putting out for other needed public programs. The purchaser of the tax supported bond has none of the problems which have been explored in this memorandum in the case of an agency proposing to undertake perpetual deficit operations. The revenue bond investor cannot call on the taxing power of the state. If the hopes and plans of the authority whose bonds he buys are not realized, he will lose not only his interest but his capital. Normally, when an investor stands to lose capital because of unrealized economic projections, he also stands to make a capital gain if the projections are in fact realized. The revenue bond stands in a no man's land where the capital is risked without any offsetting

opportunity for capital gain and without the certainty which tax support gives.

Under these circumstances, neither the states nor the Port Authority can commandeer the capital to do the Port Authority's job. The only formulas that will work are those which allay the apprehensions of investors. Subdivision (iv) contains a test which should serve that purpose and permit a great contribution by the Port Authority in the commuter railroad field. The 1.3 test and the continued inclusion of subdivision (v) would have the opposite effect.

Exhibit S-1

THE WALL STREET JOURNAL

THURSDAY, AUGUST 15, 1974

WORLD TRADE CENTER IS FAR BEHIND PLANS FOR FILLING OFFICES

• • •

Construction Delays and Glut Of Rental Space Blamed; Will It Be Full by 1976?

By RICH JAROSLOVSKY
Staff Reporter of The Wall Street Journal

NEW YORK—When plans for the controversial World Trade Center, this city's largest office complex, were unveiled in the 1960s, spokesmen confidently predicted that the buildings would be fully occupied by the summer of 1974. But that date has come and is about to pass—and spokesmen now say it will be at least 1976 before all space has been rented.

Of the nine million square feet in the complex, about four million earmarked for various governmental offices have already been leased. But of the remaining five million, earmarked for commercial firms engaged in international commerce and for foreign governments, only about three million have been leased. In other words, about 22% of the entire complex—40% of the commercial space—is still unleased.

The center, with its twin 110-story towers rising from the east bank of the Hudson River, has been stung by the current office-space surplus, says Guy F. Tozzoli, director of the World Trade department of the Port Authority of

Exhibit S-1

New York and New Jersey, which owns the building. While not as hard hit as many other lower Manhattan office buildings—several of which, never occupied, have stood vacant for years—the center is still currently about a year and a half behind its rental schedule.

Almost Filled—Once

Mr. Tozzoli blames several factors besides the space glut for the delay. For one, he notes that labor problems held up construction work, and for another, "Well, no one can have a project this size and meet all the targets." Nonetheless, he says of the office space surplus, "I don't think you could say it hasn't affected us."

As far back as 1968, two years before the first tenants moved into the complex, almost half its space was already rented. And, says Mr. Tozzoli, "at one time, I had signed memoranda of intent that filled the Trade Center, or very close to it." But since then, he says, the troubled economy has forced some firms that intended to move into the building out of business, while others found more attractive rates elsewhere.

Ironically, the World Trade Center is behind schedule despite what private brokers and developers consider a marked advantage. Because the Port Authority is a governmental agency, it pays the city only a small fraction of what it would owe in taxes if it were privately owned. Thus, brokers say, it can afford to charge lower rates to its tenants, drawing them away from private buildings. One prominent broker-developer says, "It's damned unfair competition."

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Exhibit S-2

THE NEW YORK TIMES
NOVEMBER 10, 1974

Port Authority Has Fallen On Hard Times

By Frank J. Prial

The giant Port Authority of New York and New Jersey, long one of the wealthiest, most powerful and most active public agencies in the world, has entered a period of difficulty unparalleled in its more than 50 years experience.

Even some of its highest officials, commissioners who shape its policies, agree that the Port Authority is at something of a low point in its long career. "The Port Authority," said one New Jersey Commissioner, "is dead in the water."

Interviews conducted by The New York Times over the last several weeks with Port Authority commissioners, officials, and past employees, as well as officials of New York and New Jersey and specialists in public authorities, indicate that the deterioration of the huge agency may be more serious than anyone had previously imagined.

The principal problem facing the agency, authority officials say, is its inability to sell bonds or borrow money at favorable terms. A bond holders' suit has scared off potential lenders and underwriters. It may be months or longer before the issue is resolved.

But beyond that, some of the impressive facilities of the Port Authority, an agency with a reputation for building moneymakers, have stopped making money or—in some cases—never started.

It is assumed, for instance, that the vast World Trade Center is not yet a moneymaker. But real-estate informants estimate that the project may be losing $10-million to $25-

million a year. In addition, it has incurred enormous cost overruns—perhaps $100 million so far. "I guess you could say it's a white elephant," said one Port Authority official.

Even more surprising is the fact that the Holland Tunnel, the facility that poured money into the Port Authority's coffers for many years, now apparently is barely breaking even.

The Port Authority Bus Terminal, at 41st Street and Eighth Avenue in Manhattan, also is experiencing difficulties. The terminal is crowded with buses, but many of the bus companies are out of money and are resisting having to pay for a long-planned expansion of the terminal northward to 42d Street.

The Port Authority reportedly is considering doing away with commuter discounts on its bridges and tunnels, and channeling the extra income into the bus terminal expansion.

The crisis is also one of leadership. William J. Ronan, chairman of the Port Authority, apparently is not the leader some of his fellow commissioners had expected him to be.

"For all practical purposes," said one senior member of the authority, "Ronan is finished as head of the Port Authority."

Port Authority officials stressed that Dr. Ronan's shaky position was not related to the disclosure that he had received a gift of $550,000 from former Gov. Nelson A. Rockefeller.

Other Port Authority facilities in or near financial trouble include:

¶Newark Airport. Now known as Newark International Airport, this new operation with its huge satellite terminals is a loser, although it was a money-maker as recently as a

few years ago. Plans to finish a third satellite terminal have been postponed and traffic in the existing terminal is minimal. "It's like a ghost town out there," said one Port Authority man, glumly.

¶PATH—Port Authority Trans-Hudson. The agency's 14-mile commuter railroad is expected to run up a $30-million deficit this year. Plans to extend the line from Penn Station in Newark to Newark Airport and on to Plainfield in Union County are in abeyance. Privately, some Port Authority officials predict the extension will never be built.

¶PATH Transportation Center. The Port Authority's Jersey City office building, train station and bus terminal is losing money, too. "We never needed it," one commissioner said. "It has enormous losses but we haven't figured out how to handle the bookkeeping yet." The project, according to one former Port Authority executive, originally was undertaken to placate John V. Kenny, the former Hudson County Democratic leader, who wanted a Port Authority project in his area.

¶The West Side Passenger Ship Terminal financed by the City of New York but constructed by and scheduled to be operated by the Port Authority. The ship terminal is about to open at a time when passenger-ship travel has all but disappeared from New York harbor. User charges from the steamship lines are supposed to cover rental payments and operating and maintainance costs. The terminal is scheduled to be formally dedicated later this month.

¶The Newark Truck Terminal. This large terminal near Newark Airport has been a financial loss to the agency for several decades.

¶The George Washington Bridge Bus Terminal. Built 11 years ago, this station has never been a success and is still under-utilized.

¶The Bayonne Bridge and the Outerbridge Crossing. Along with the Goethals Bridge, these lines between Staten Island and New Jersey also have been money-losers for decades. Authority officers said, however, that the Goethals Bridge, which connects Brooklyn, Queens and Long Island with the New Jersey Turnpike via the Verrazano Narrows Bridge and the Staten Island Expressway, makes money.

¶The World Trade Center. "It is a vast white elephant," one commissioner said. "It's supposed to cost $600-million when they made the deal. Then there were a long series of strikes. They decided to add a commodity exchange. Then they took over the broadcasting antennas from the Empire State Building. What's more, there has been tremendous inflation. The cost is over $900-million now and the end is nowhere in sight."

Added to the World Trade Center's problems is the fact that the largest tenant, the State of New York, is witholding rent payments of $115,000 a month, with the total bill now around $4-million. The state contends it is being overcharged and the matter is now being negotiated.

Audit Under Way

Just how much each of these facilities is losing, or making, is being determined in an audit by the New York State Controller, Arthur J. Levitt. The Port Authority does not itemize figures for each of its installations in its annual financial report.

An audit done by Mr. Levitt in 1969 showed that the George Washington Bridge, the Lincoln Tunnel and the three airports—Kennedy, Newark and La Guardia—taken together, were more than profitable enough to carry all the other Port Authority operations and still contribute to enormous profits.

Exhibit S-2

According to Port Authority officials, the Lincoln Tunnel and the George Washington Bridge still are profitable, as are Kennedy and La Guardia airports. "There is no doubt, though," said one Port Authority man, that "the fuel crisis has hurt us on the ground and in the air."

Of Dr. Ronan, one commissioner said:

"Rockefeller shoved Ronan down our throats. Now he's running Rockefeller's campaign for Vice President, he is still involved with Rockefeller's Committee for Critical Choices, and he's picking up consulting jobs.

"Meanwhile, he won't let the Port Authority staff make any decisions. As a result, nothing is getting done. Bill Ronan is a brilliant man, but he's an idea man, not an administrator. You can't run this agency part-time."

There is a movement among the commissioners to confine the chairman to presiding at meetings and letting the executive director run the authority.

"If Kuhbach can't do it, we'll get someone else," another commissioner said, "but at least we should give him a chance." A. Gerdes Kuhbach has been executive director of the Port Authority since last year.

How did the Port Authority get into its present condition? "Well, for one thing, the management got bad," said a commissioner with several years of experience on the authority.

"Austin Tobin was the Port Authority," he said. "He put it together. He conceived the projects and he made the bonds acceptable—and he caused the whole thing to become moribound because of his quarreling with former Gov. William T. Cahill of New Jersey."

"Meddling Is Charged"

This commissioner, who like several others would speak only off the record, is convinced that Mr. Tobin's abrupt

Exhibit S-2

resignation as executive director of the Port Authority in 1972 was provoked by what they call Mr. Cahill's "meddling" in the Port Authority's affairs.

Mr. Cahill, a Republican who preceded Brendan T. Byrne, was elected on a promise to involve the Port Authority more deeply in mass transportation. And, in fact, he extracted from the agency various agreements that it would take on mass-transportation projects. Aside from various studies, however, there is little physical evidence of any of those agreements four years after most of them were made.

The crux of Governor Cahill's fight with the Port Authority was an agreement signed in 1962 whereby the Port Authority would revitalize what is now PATH in exchange for a promise from both New York and New Jersey that it would never again be required to take on a deficit passenger rail operation.

Governor Cahill and other critics of the Port Authority, such as Theodore W. Kheel, the labor lawyer, have long argued that the agency sits on vast financial reserves that should be released to help solve the area's transportation problems.

The Port Authority contends that its operation of PATH and the bus terminals and its underwriting of the purchase of almost 1,000 rail commuter cars for New York State do, in fact, constitute an involvement in mass transportation.

The argument is now in the courts. Both states rescinded the 1962 agreement with the Port Authority only to find that it was actually a covenant between the agency and its bond holders—a covenant the Port Authority claims is inviolate until all the bonds issued under it have been retired, sometime in the next century.

After the repeal of the covenant by the states, the bond holders, represented by the United States Trust Company,

sued. The former chairman of the United States Trust Company is Hoyt Ammidon, a former vice chairman of the Port Authority, and one of the prominent attorneys for the bond holders is Robert B. Meyner, who was Governor of New Jersey when the preliminary negotiations on the take-over of PATH and the construction of the World Trade Center were underway.

In an interview recently, Mr. Meyner noted that all the early negotiations had been handled by his Transportation Commissioner, Dwight Palmer, and that he had left office when the deal including the covenants was finally signed.

The Port Authority's present situation stems from the fact that it cannot borrow money at favorable terms until the lawsuit is resolved. And, as former Governor Meyner said, "This suit could go right to the Supreme Court. There are public authorities all over the nation watching this case."

Some commissioners reluctantly agree. "The lawyers have got their meters running," said one. "This could go on for a long, long time."

"In the meantime," he continued, "we can't raise any money. Morgan Guaranty turned us down on a loan, and as for selling bonds, Merrill Lynch said they couldn't sell a trading stamp for us right now."

It Would Sell

Not everyone agrees with this. A specialist in public-authority bonds who declined to be named said he would have no trouble selling a Port Authority issue. "It might cost them more than they would like," he said, "but it would sell."

Dr. Ann Marie Walsh of the Twentieth Century Fund, a long-time student of public authorities, echoed that opin-

ion. "They could float more bonds," she said, " but they've had things their own way for so long, they don't want to pay a higher rate."

Dr. Walsh, who is writing a book on authorities, insists that she is "no fan" of the Port Authority, but she credits it with being highly efficient and very competent. "Right now," she said, "they are being blamed for a lot of things not of their own doing."

She added that the various investigations of the port agency about to begin or being called for were unlikely to turn up any startling revelations. She said she believed that Mr. Kheel's claims that the authority has huge sums of money that could be used elsewhere were "exaggerated a bit."

"Technically," Dr. Walsh said, "they have to maintain reserves to protect their bond holders. There is an advantage for them in building up higher reserves than might be necessary—this keeps their funds tied up. But the truth of how much money they have available is probably somewhere between Mr. Kheel's contentions and those of the Port Authority."

Among the various investigations of the Port Authority now going on is a routine audit by Mr. Levitt's office. Part of that audit first disclosed the fact that the state was not paying rent for the 56 floors it occupies in the World Trade Center, pending an agreement on what the rent should be. Yesterday, Mr. Levitt said he would over the next three weeks issue reports on "the general profitability of the Port Authority, the profitability of each of its facilities, and the efficiency of several aspects of the port's purchasing and concession activities."

The Port Authority, according to one commissioner, netted about $4-million last year and is expected to net about

Exhibit S-2

$20-million in 1974. Mr. Levitt's auditors generally agree with these figures. Privately, however, they believe that the authority's accounting procedures are designed to minimize profits by tying up as much money as is legally possible in reserves covered by covenants with bond holders.

"It's all perfectly legal and supercautious fiscal practice," one state auditor said, "but they could show a much more impressive bottom line if they chose to do so."

The $4-million and $20-million figures, in any event do not represent sufficient income for the authority to build at the rate it had done so in the past.

Governor Byrne's announcement last week that he wanted an outside audit of the Port Authority prompted Mr. Levitt to disclose that his audit was already under way. In the data Mr. Levitt sent to Mr. Byrne he seemed to disagree with the contention that the agency is experiencing financial problems.

"The fact that much of the authority's borrowings are shortterm," Mr. Levit said, "indicates that earnings from its facilities are so great as to allow the authority to undertake substantial construction commitments by means of short-term borrowings, which are repaid out of current revenues."

Actually the Port Authority has curtailed almost all its construction commitments, including the proposed expansion of the 41st Street bus terminal. That plan, now postponed, called for doubling the size of the terminal by extending it north to 42d Street.

Exhibit S-3

NEW YORK—NEW JERSEY PORTS

6%

2008

40th Series

1975:

Date	Bid	Asked
Jan. 3	68½	71½
Sat. 4	68½	71½
Sun. 5	—	—
Mon. 6	—	—
Tues. 7	Not Available	
Weds. 8	70	73
Thurs. 9	70½	73½
Fri. 10	71½	74½
Sat. 11	Not Available	
Sun. 12	—	—
Mon. 13	—	—
Tues. 14	74	78
Weds. 15	74½	78½
Thurs. 16	77	81
Fri. 17	77	81
Sat. 18	77	81
Sun. 19	—	—
Mon. 20	—	—
Tues. 21	77	81
Weds. 22	78	82
Thurs. 23	78½	82½

SOURCE: NEW YORK TIMES

Exhibit S-3

MASSACHUSETTS PORTS
6% 2011

1975:

Date	Bid	Asked
Jan. 3	78	81
Sat. 4	78	81
Sun. 5	—	—
Mon. 6	—	—
Tues. 7	Not Available	
Weds. 8	79	81
Thurs. 9	79½	81½
Fri. 10	79½	81½
Sat. 11	Not Available	
Sun. 12	—	—
Mon. 13	—	—
Tues. 14	80	—
Weds. 15	81	85
Thurs. 16	81	85
Fri. 17	82	86
Sat. 18	82	86
Sun. 19	—	—
Mon. 20	—	—
Tues. 21	83	87
Weds. 22	83	87
Thurs. 23	83½	87½

SOURCE: NEW YORK TIMES

Exhibit S-4

[LETTERS TO THE EDITOR]
THE NEW YORK TIMES,
May 1, 1974

JERSEY AND THE P.A.: THE BROKEN VOW

To the Editor:

This letter is prompted by the sickening spectacle pictured in the May 1 Times of a group of public officials smirking happily over the signing of a New Jersey bill to repeal the 1962 covenant with respect to Port Authority expenditures in the mass-transit field. Public credit depends in a large measure on the good faith of government at all levels. That responsible officials can gleefully dishonor a state's commitment can only be destructive of public credit. The 1962 covenant was embodied in concurrent legislation adopted by the two states and reads: "The two states covenant and agree with each other and with the holders of any affected bonds" . . . that no pledged revenues shall be applied . . . "for any railroad purposes whatsoever other than permitted purposes . . ."

The verb "covenant" means to promise by a covenant. The noun "covenant" means a "formal, solemn, and binding agreement." Accordingly, in 1962 each of the two states *promised by a formal, solemn and binding agreement* that the Port Authority's activities in the railroad field would be limited as indicated.

If the State of New Jersey can cavalierly renege on this promise, how can an investor feel assured that it will always honor the promise to pay printed on the face of its bonds? Were I responsible for rating its credit, no state which dishonored a promise of this sort would retain an Aaa rating on its general credit. And the sad fact is that in terms of

Exhibit S-4

a contribution to mass transit the action taken really will accomplish nothing. There is no great excess flow of current funds which can be made available, and instead of making large borrowing capacity available for mass transit it will impair the borrowing power of the Port Authority for any purpose.

The Port Authority was not created for the purpose of solving mass-transit problems, in spite of recent attempts to rewrite history. The Port Authority has been expected to operate as a public business agency with no source of funds other than revenues from its services. A broad view of urban and energy problems suggests that government should act to discourage auto traffic into major cities in favor of the greater use of mass transit. This would probably involve a sizable shift of funds from charges imposed on automobile traffic to the support of mass transit; to do this is an exercise of the state police power, and it should be done in this instance by the two states themselves, and applied to all automobile traffic entering Manhattan.

The action of the states in repealing the 1962 Port Authority covenant is actually a cop-out from their own responsibilities. Only Governor Wilson seems to realize the significance and importance of honoring his state's commitment.

JOHN F. THOMPSON
New York, May 1, 1974

The writer has spent forty years in the municipal bond field.

Exhibit S-5

[LETTERS TO THE EDITOR]

THE NEW YORK TIMES
MAY 14, 1974

MASS TRANSIT AND P.A. FISCAL PRUDENCE

To the Editor:

John F. Thompson's May 7 letter dealing with the Port Authority requires the following comments on behalf of the Port Authority.

To the extent that Mr. Thompson implicity criticizes the Port Authority commissioners, the record should be clear that:

1. The Port Authority's excellent credit rating has been based principally on the prudent and responsible management and fiscal policies of the commissioners and their career staff, and the resulting ability to maintain debt service coverage and reserves adequate to meet its obligations and programs. Thus, in 1973, our net revenues met bonded debt service requirements 2.12 times.

2. At the same time, the Port Authority, an agency of the States of New York and New Jersey, operates under legislation adopted by the two states to establish policies and programs for the Port Authority.

3. When the State of New Jersey on May 1 approved an act to repeal the 1962 statutory covenant, I stated it would be welcome to have both states, New Jersey and New York, in agreement on this matter. It could serve to expedite both legal and physical progress.

I also stressed that the lifting of the statutory covenant *per se* does not mean that bondholders' security would be eroded. The two states have not determined and the com-

Exhibit S-5

missioners have not acted to impose deficit burdens on the Port Authority in the rail or other fields which could impair revenue coverage or reserve requirements established in our indentures. Additionally, the board of commissioners is committed to preserve the credit of the Port Authority, which is vital to the present and any future undertakings of the agency. Governor Byrne, on signing the New Jersey bill, expressly stated his own determination to avoid impairing the Port Authority's credit.

4. When it was announced that the U. S. Trust Company had sued the State of New Jersey to declare the repealer invalid, I stated on behalf of the Port Authority that we expected and welcomed an expeditious legal test of the validity of the repealer.

None of us has claimed that the Port Authority was created solely for solving mass-transit problems, but the board and the two states are determined to make significant contributions to the improvement of mass transit facilities. I can assure Mr. Thompson and his colleagues in the municipal bond field that the board of commissioners will continue to act with fiscal prudence and responsibility in carrying forward all the projects and programs of the Port Authority.

WILLIAM J. RONAN
Chairman, Port Authority
of New York and New Jersey
New York, May 9, 1974

Exhibit S-15

May 1st, 1974

DRAFT

THE MUNICIPAL BOND CLUB OF NEW YORK

Members of the Municipal Bond Club of New York have expressed to the Club's Board of Directors their great concern regarding recent events affecting the Port Authority of New York and New Jersey. On April 30th, Governor Byrne of New Jersey signed legislation removing a statutory covenant granted to bondholders in 1962, limiting the Authority's activities in mass transportation projects. At the signing ceremony were Authority officials including Dr. William J. Ronan, the new Chairman, Mr. Kellogg, the former Chairman, State Officials, and Mr. Paul O'Dwyer, New York City Council President.

The Municipal Bond Club members have relied on the Authority's representations regarding the 1962 covenant for the past 12 years. The unprecedented removal of the covenant will adversely affect the bondholders investment. The measure is a breach of bondholders' contract. The value of Port Authority Bonds has already declined in the marketplace and selling bondholders have already suffered losses. It is the opinion of the Municipal Bond Club Directors, that the Authority will be unable to publicly finance its projects in the future until litigation introduced by the United States Trust Company, on behalf of the bondholders, is resolved.

This action by the State of New Jersey is a severe blow to the Port Authority's record of financial integrity for over 50 years. The municipal bond industry is shocked by the moral bankruptcy of the government leaders in both New Jersey and New York and now the Port Authority's new Chairman, Dr. Ronan. We cannot understand how New Jersey can lend its moral pledge to a new sports com-

Exhibit S-15

plex on the one hand, and on the other hand attempt to remove a significant contract with the Port Authority bondholders. Similarly, the lack of good faith apparent in the New York State legislature is shocking when one considers the many billions of dollars of moral obligation financing undertaken by our industry for the state in recent years.

The Municipal Bond Club would anticipate that the municipal bond credit rating services will address themselves to this inappropriate legislative action by the states at the appropriate time. The result may be the lowering of credit ratings in each state which will, in the long run, increase the cost of state government and directly increase taxes imposed upon the citizens of each state. The lack of confidence in the minds of investors, and members of the municipal bond industry, may well preclude the future financing of urgently needed public projects.

The Municipal Bond Club members are confident that another way to finance needed mass transportation facilities in New Jersey and New York exists without jeopardizing the investment of present bondholders. It is indeed distressing that thousands of investors in Port Authority bonds purchased through our member firms as security dealers have been ignored. They have lost principal value through the political maneuvering of the elected officials in New Jersey and New York.

Exhibit S-16

LETTERHEAD OF

W. H. MORTON & CO.

May 29, 1974
Mr. Orville H. Schell, Jr., President
Association of the Bar of the City of New York
42 West 44th Street
New York, New York

Dear Sir:

I have read in the Daily News and in the Daily Bond Buyer of your telegram to Governor Wilson urging that he sign legislation repealing the State's 1962 Covenant with bondholders of the Port Authority. I am shocked that an organization of attorneys would advocate that the State dishonor its commitment.

For your information I enclose copies of a statement by the Securities Industry Association Public Finance Council and a letter to the Governor from the Board of Governors of the Municipal Forum of New York regarding this matter. I hope that when you and your committee have acquainted yourselves with the facts concerning this matter you will withdraw your gratuitous telegram to the Governor.

Very truly yours,

JOHN F. THOMPSON
Vice President

JFT/me
enclosures

Exhibit S-29

MOODY'S INVESTORS SERVICE, INC.

MUNICIPAL CREDIT REPORT

New Issue Report Supplementary
to Report Dated 10-20-71

February 4, 1972

THE PORT OF NEW YORK AUTHORITY

Bond offering: $150,000,000 Consolidated Bonds expected February 9, 1972

Ratings	Numeric	Letter
Air Terminal, Marine Terminal, Gen. & Rfdng.	PRIME 03 (-)	Aa & A (M.T.)
Consolidated Bonds	GOOD (-)07 (-)	A

Description:

Type enterprise : bi-state agency operating facilities in 1,500 square mile Port District in New York and in New Jersey

Facilities : 2 toll tunnels, 4 toll bridges, 3 commercial airports, 1 general aviation airport, 2 heliports, 6 marine terminals, 2 truck terminals, 1 bus station, Hudson Tubes railroad; World Trade Center

Exhibit S-29

Expansion : includes expansion of Kennedy International and Newark Airports, Port Newark and Elizabeth Marine Terminals, new terminals for PATH, expanding bus station, World Trade Center construction

Trade Center cost : remains at $700,000,000 (up $50.0 million from early 1971)

Future projects : planning consolidated passenger ship terminal; authorized by both states to undertake mass transit rail links to both Kennedy International and Newark Airports

Operations (Years ended December 31; $ in 000):

	1969	1970	1971	% Change 1970	% Change 1971
Gross rev. & income	$ 256,436	$ 271,385	$ 300,279	5.8	10.6
Operating expenses	134,297	144,988	175,333	8.0	20.9
Net revenues	122,139	126,397	124,946	3.5	–1.2
Total bond service	51,870	53,667	52,454	3.5	–2.3
Invested in facilities	2,098,196	2,398,502	2,760,810	14.3	15.1
Bond & bank loan debt	1,377,645	1,470,691	1,711,748	6.7	15.1

Historical Key Ratios:

	1969	1970	1971
Net take-down (%)	47.6	46.6	41.6
Interest coverage	4.79	4.80	4.24
Avg. annual bond sv. coverage	1.64	1.52	1.31
Interest safety margin (%)	37.7	36.9	31.8

Future Coverage: 1.18 times by 1971 net on estimated future peak debt service of $105.6 million on outstanding and new bonds

Exhibit S-29

Summary:

The financial strength and technical accomplishments of this Agency continue highly impressive, but it now clearly cannot avoid certain difficulties whose importance is reflected in the reevaluation reflected in the rating changes shown above. Internally, the Authority faces the same cost pressures evident elsewhere, is directly affected by the problems of increasingly complex vehicular congestion both on the ground and in the air, and additionally is prosecuting a large and expensive office building construction program which involves the specialized risks inhering to the real estate development field. Externally it is being pushed (irresistably in our judgment) into large-scale mass transit programs, while concerns about the environment impose as yet undefined problems for airport expansion and even routine operation of the river crossings. New top management is deemed not likely to find these problems either more or less amenable to solution than would the retiring director.

$150,000,000 Consolidated Bonds, Thirty-ninth Series:

Time: bonds to be negotiated for sale on WEDNESDAY, FEBRUARY 9, 1972

Bonds dated: February 1, 1972

Bonds due: February 1, 2007

Purpose: capital expenditures for Authority's airports, docks, wharves, bus terminals, and parking, storing, or training facilities relating to any of these, balance of proceeds if any, not in excess of 10% of proceeds, will be used for capital expenditures in connection with any other facility of the Authority.

Exhibit S-29

Security: payable on a parity with all other Consolidated Bonds by a pledge of net revenues of all existing Authority facilities (not including cars acquired under the State's commuter car program) and any additional facilities financed from Consolidated Bonds; the General Reserve Fund; and the Consolidated Bond Reserve Fund.

Last sale: 10-27-71, $100,000,000 Consolidated Bonds, Thirty-eighth Series, due 2006, at 98.02 NIC 5.4474% (20-Bond Index 5.11%) to group including Salomon Brothers; Merrill Lynch, Pierce, Fenner & Smith; White Weld; W. H. Morton; Weeden; Bear, Stearns.

Mandatory retirement, due August 1 ($ in 000):

1982-85	$ 750	1994-95	$ 6,000
1986-87	1,500	1996-97	7,500
1988-89	1,750	1998	8,000
1990-91	3,000	1999-02	9,000
1992-93	3,500	2003-06	10,500
		2-1-2007	10,500

Debt Service Coverage ($ in 000)

		Last 3 Fiscal Yr. Avg.	Fis. Yr. Ended 12-31-71
Net revenues		$124,369	$124,946
Estimated maximum future requirements:[a]			
Interest	$ 70,727 (1972)	1.76x	1.77x
Amortz. & Int.	105,621 (1986)	1.18	1.18

a. Requirements exclude State-guaranteed commuter car bonds, and amortization payments on the Bank Loans.

Exhibit S-29

Cost of Facility or Authority Investment in Facility, as of 12-31-71 ($ in 000)

Facility	Investment
John F. Kennedy Intl. Airport	$622,500
World Trade Center	545,700
Newark Airport	236,000
George Washington Bridge	213,000
Lincoln Tunnel	196,000
Hudson Tubes Facility (PATH)	167,800
LaGuardia Airport	152,500
Port Newark	131,600
Elizabeth-Port Auth. Marine Term.	125,000
Brooklyn-Port Auth. Marine Term.	95,700
Holland Tunnel	68,800
Port Authority Bus Terminal	59,500
Port Authority Building	23,500
Goethals Bridge	22,600
Bayonne Bridge	18,300
Hoboken-Port Auth. Piers	18,100
Outerbridge Crossing	17,300
Erie Basin-Port Auth. Piers	12,800
Teterboro Airport	11,400
New York Truck Terminal	9,900
Newark Truck Terminal	8,200
Columbia St. Marine Term.	4,200
West 30th Street Heliport	500
Downtown Manhattan Heliport	220

BONDED DEBT: At the end of 1971, the Authority has $1,446,748,000 bonds outstanding, comprising $16,703,000 of 4 series of General and Refunding Bonds, $28,601,000 of 3 series of Air Terminal Bonds, $3,389,000 of 2 series of Marine Terminal Bonds, and $1,398,055,000 of 37 series of Consolidated Bonds. On 12-31-70, the Authority placed in trust with the Trustee amounts available from its Special Reserve Fund, Air Terminal Reserve Fund, and Marine Terminal Reserve Fund sufficient to secure fully, unconditionally, and absolutely the Authority's obligation to provide for redemption and interest until redemption of the General and Refunding, Air Terminal, and Marine Terminal Bonds. With establishment and during maintenance of these trusts, all Consolidated Bonds are secured on a parity by net revenues of all Authority existing facilities and any additional facilities financed wholly or partly through Consolidated Bonds; net revenues are not subject to the prior liens to which net revenues from certain facilities had been subject in favor of General and Refunding, Air Terminal, and Marine Terminal Bonds.

Exhibit S-29

BANK LOANS: at 12-31-71, the Authority also had outstanding $265,000,000 in bank loans, consisting of $105,000,000 balance of a 1968 loan of $210,000,000 due 1973-75, $60,000,000 total of a 1970 loan due annually 1975-77, and $100,000,000 of a July 1971 loan due annually 1975-77. Under terms of the loan agreements and as a result of establishment and maintenance in trust of the Special Reserve Fund, Air Terminal Reserve Fund, and Marine Terminal Reserve Fund, annual installment payments on bank loans beginning in 1971 are to be made exclusively from net revenues available in the Consolidated Bond Reserve Fund. Loan payment and interest on loans is subject to payment of debt service on the General and Refunding, Air Terminal, Marine Terminal, and Consolidated Bonds, and to payment into the General Reserve Fund of the amount needed to maintain this Fund at its requirement of 10% par value of the bonds.

DEBT STRUCTURE and COVERAGE: The current offering of Consolidated Bonds is the largest issue of this type by the Authority and is part of a $200,000,000 authorization of 1-13-72. With inclusion of debt service on the bonds now being offered, estimated overall debt service now ranges

Exhibit S-29

from above $101.0 million annually 1972-87, with a peak of $105.6 million in 1986, and declines thereafter through 2007. Present net revenues exceed estimated peak debt service on the outstanding and new bonds (see page 2), but it is to be noted that the coverage of estimated peak debt service by current net revenues is less than that previously (at the time of the October 1971 bond offering, net revenues for 1970 covered estimated peak debt service 1.31 times).

RECENT DEVELOPMENTS: On December 13, 1971, it was reported that Mr. Austin J. Tobin, Executive Director of the Authority since 1942, announced his retirement from that post effective March 31, 1972. The Authority Commissioners have appointed Mr. Matthias E. Lukens, Deputy Executive Director since 1961, as Acting Executive Director. In late January 1972, Governor Cahill vetoed minutes of the Authority's Commissioners creating the title of Executive Director Emeritus for Mr. Tobin.

There continues to remain one vacancy on the 12-member Commission, following the resignation of one of the New Jersey commissioners in July 1971 following his conviction, along with other public officials including the Mayor of Jersey City, on extortion counts.

AREA DEVELOPMENTS: Effective January 5, 1972, toll rates on the Triborough Bridge and Tunnel Authority's bridges and tunnels were raised substantially, including the doubling of toll rates for most facilities. The higher toll rates were effected in connection with meeting increased costs of rapid transit facilities and service in New York City, under which subway and bus fares also were raised from 30¢ to 35¢. The Triborough's toll facilities act as traffic links on routes which serve as feeders to many of the Port Authority's facilities. Triborough Bridge and Tunnel Authority is now operated by New York State's Metropoli-

Exhibit S-29

tan Transportation Authority (MTA). The Chairman and Chief Executive Officer of MTA is Dr. William J. Ronan; Dr. Ronan is also one of the New York Commissioners of the Port Authority.

OPERATIONS: For 1971, operating data showed moderate increase in traffic on the Authority's toll bridges and tunnels, a small gain in passenger traffic at the 3 commercial airports, small decline in plane movements at these airports, and decline in waterborne tonnage at certain of the marine terminals due most likely to the East Coast dock strike in the fall of 1971. The decline in plane movements and the slight rise on airport passengers may be due to the increased number and frequency of service of the larger jets being used by the air carriers.

Exhibit S-29

	Fiscal Years Ended December 31			% Change	
	1969	1970	1971	1970	1971
Bridge and tunnel traffic (one-way trips):					
Holland Tunnel	19,869,600	20,111,000	20,445,000	1.2	1.7
Lincoln Tunnel	30,977,100	31,507,000	32,193,000	1.7	2.2
Geo. Washington Br.	69,283,000	71,142,300	74,097,000	2.7	4.1
Bayonne Bridge ...	3,669,500	3,743,600	3,818,000	2.0	2.0
Goethals Bridge	15,738,000	17,898,600	19,699,300	13.7	10.1
Outerbridge Csng...	4,079,800	3,878,600	4,109,500	– 4.9	5.9
Total traffic ...	143,617,200	148,281,000	154,361,800	3.2	4.1
% commercial	14.2	13.7	n.a.		
Plane movements at airports:[a]					
Kennedy Inter.	480,557	365,848	340,800	–10.5	– 6.9
La Guardia Airport..	305,227	297,652	318,000	– 2.5	6.7
Newark Airport	234,125	204,595	188,000	–12.6	– 8.3
Total movements	1,019,909	868,095	846,800	–14.9	– 2.5
Passenger traffic at arpts:[a]					
Kennedy Inter.	19,507,694	19,096,705	19,200,000	– 2.1	0.5
La Guardia Airport..	11,736,383	11,845,141	12,725,000	0.9	7.4
Newark Airport	7,130,537	6,460,489	6,100,000	– 9.4	– 5.6
Total passengers	38,374,614	37,402,335	38,025,000	– 2.5	1.7
Bus departures[b]	1,235,000	1,230,000	1,230,000	– 0.4	0.0
PATH passengers	37,751,200	38,954,000	n.a.	3.1	
Waterborne tonnage, long tons:					
Port Newark	4,011,000	4,296,000	3,857,000	7.1	–10.2
Bklyn Marine Term.	1,846,000	1,770,000	1,526,000	– 4.1	–13.8
Eliz. Marine Term.	4,328,000	6,408,000	6,448,000	48.0	0.6

a. Excludes plane movements at Teterboro Airport; movements and passenger traffic are rounded, as reported; passenger traffic at Kennedy International is sum of domestic and international traffic.

b. Bus departures at Port Authority Bus Terminal.

Exhibit S-29

Financial operations for 1971 show a small decline in net revenues as operating expenses rose at a greater rate than the rise in gross revenues. Net revenues, however, continued to provide a good level of coverage on current debt service requirements. The expansion program of the Authority is reflected in the growth of the amount invested in facilities, as well as the rise in debt. Financial operations and financed position data follow ($ in 000).

	Fiscal Years Ended December 31			% Change	
	1969	1970	1971	1970	1972
Financial Operations:					
Gross operating revenues	$ 242,797	$ 255,318	$ 279,935	5.2	9.6
Gross revenue & income	256,436	271,[illegible]	300,279	5.8	10.6
Operating expenses	134,297	144,988	175,333	8.0	20.9
Operating ratio (%)	55.3	56.8	62.6		
Net revenues	$ 122,139	$ 126,397	$ 124,946	3.5	– 1.2
Interest on funded debt	25,507	26,346	29,441	3.3	11.7
Int. & mandatory redemp. pyts.	51,870	53,667	52,454	3.5	– 2.3
Times covered	2.35	2.36	2.38		
Safety margin (%)	27.4	26.8	24.1		
Financial Position Data:					
Invested in facilities	$2,098,196	$2,398,502	$2,760,810	14.3	15.1
General Reserve	120,264	127,069	144,675	5.6	13.8
Ge. & Ref. Special Reserve	9,165	19,268	18,658	110.2	– 3.2
Air Terminal Reserve	19,739	33,069	32,312	67.5	– 2.3
Marine Terminal Reserve	2,219	3,954	3,773	78.2	– 4.6
Consolidated Bond Reserve	—	2,681	253	–	–95.
Total reserve	151,837	186,041	199,671	22.5	7.3
Total bond & note debt	1,202,645	1,270,691	1,446,748	5.6	13.6
Bank loans	175,000	200,000	265,000	14.3	32.5
Total debt	1,377,645	1,470,691	1,711,748	6.7	15.2

Exhibit S-29

OTHER DEVELOPMENTS: Our October 20, 1971, report commented on various actions or litigations pending with respect to certain of the Authority's facilities or for certain statutory provisions.

In November 1969, a lawsuit instituted in New Jersey Superior Court, Chancery Division, Bergen County, against the Authority, Pan American World Airways, and the State's bureau of Aeronautics by South Hackensack Township, its Board of Education, and 2 Township residents sought declaratory judgment that the 1967 agreement between the Authority and Pan American for Pan American's operation of Teterboro Airport as a public airport constitutes an unlawful transfer of a public facility to private use and airport operation is illegal because it is not licensed by the Bureau. On 11-5-70, defendants' motions for summary judgment were granted, and a judgment dismissing the amended complaint was entered. On 11-29-71, the Appellate Division of the Superior Court affirmed the judgment of the Chancery Division, and the time for further appeals from the Division's decision has now expired.

Exhibit S-31

MOODY'S INVESTORS SERVICE, INC.
MUNICIPAL CREDIT REPORT

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY
Rating: Consolidated Bonds: A

June 14, 1973
RC

Sale: $100,000,000 Consolidated Bonds, Fortieth Series, for bids on 6-20-73

Dated: 6-1-73 Due: 6-1-2008 Call: beginning in 1983

L.O.: Hawkins, Delafield & Wood, New York City

Type enterprise:	bi-state agency operating 2 toll tunnels, 4 toll bridges, 3 commercial airports, 1 general aviation airport, 2 heliports, 6 marine terminals, 2 truck terminals, 1 bus station, PATH passenger rail facilitiy, World Trade Center in 1,500 square mile Port District
Pledged revenues:	Consolidated Bonds payable on parity from net revenues of all existing facilities of Authority and any additional facilities financed from Consolidated Bonds, the Authority's General Reserve Fund, and the Consolidated Bond Reserve Fund
Coverage after sale:	net revenues for 1972 cover estimated peak interest and amortization on outstanding and new Consolidated Bonds by 1.25 times.

Exhibit S-31

Operations (years ended 12-31; $ in 000):

	1970	1971	1972	% Change 1971	% Change 1972
Gross revenues	$ 271,385	$ 300,279	$ 339,618	10.6	13.1
Operating expenses	144,988	175,333	199,161	20.9	13.6
Net revenues	126,397	124,946	140,475	-1.2	12.4
Total debt service	53,667	52,454	63,358	-2.3	20.8
Invested in facilities	2,398,502	2,760,810	3,047,507	15.1	10.4
Bond & bank loan debt	1,470,691	1,711,748	1,796,810	15.1	5.0

Historical Key Ratios:	1970	1971	1972
Operating ratio (%)	56.8	62.6	62.3
Net take-down (%)	46.6	41.6	41.3
Interest coverage	4.80	4.24	3.61
Avg. annual debt sv. coverage	1.52	1.31	1.23
Interest safety margin (%)	36.9	31.8	29.9

Summary: The Authority's financial strength and technical accomplishments continue highly impressive. The Authority has expanded capacity of all its facilities, and further expansion of its marine terminal and air terminals is underway. In addition, the Authority is completing a large and expansive office building construction (World Trade Center), a program which involves the specialized risks inhering to the real estate development field. Its facilities, as is the case with comparable facilities elsewhere, are sensitive to economic, labor, and environmental conditions that can favorably or unfavorably affect their usage, but the earnings derived from these facilities remain at good levels.

Legislation in both states has been enacted in which the Authority will contribute in the capital cost of passenger

Exhibit S-31

rail projects to link Kennedy International Airport with Manhattan, link Newark International Airport with Newark and extend the PATH system into Union County in New Jersey, and provide a direct rail connection to Manhattan for Erie-Lackawanna rail users in New Jersey. In addition, this new legislation amends 1962 statutes which served as the basis for a statutory covenant limiting the Authority's ability to participate in deficit passenger railroad projects. These deficit limitations will not apply to the holders of bonds hereafter issued by the Authority, including these bonds. It is noted that none of the proceeds of these bonds are for any of these passenger rail projects, and the Authority indicates that these rail projects financed from their portion of the capital funds are anticipated to be self-supporting.

Bonded Debt: At the end of 1972, the Authority had $1,566,810,000 bonds outstanding, comprising $15,852,000 of 4 series of General and Refunding Bonds, $24,641,000 of 3 series of Air Terminal Bonds, $2,983,000 of 2 series of Marine Terminal Bonds, and $1,523,334,000 of 38 series of Consolidated Bonds. On 12-31-70, the Authority placed in trust with the Trustee amounts available from its Special Reserve Fund, Air Terminal Reserve Fund, and Marine Terminal Reserve Fund sufficient moneys to secure fully, unconditionally, and absolutely the Authority's obligation to provide for redemption and interest until redemption of the General and Refunding, Air Terminal, and Marine Terminal Bonds. With establishment and during maintenance of these trusts, all Consolidated Bonds are secured on a parity by net revenues of all Authority existing facilities and any additional facilities financed wholly or partly through Consolidated Bonds (excluding cars financed under N.Y. State Commuter car program) net revenues are not

Exhibit S-31

subject to the prior liens to which net revenues from certain facilities had been subject in favor of General and Refunding Air Terminal, and Marine Terminal Bonds.

As of 5-23-73, there were $1,618,584,000 of Consolidated Bonds outstanding, but including $100,000,000 of Series Z Consolidated Notes of 3.60% interest due 12-17-73.

Bank loans: At 12-31-72, the Authority also had outstanding $230,000,000 in bank loans, consisting of $70,000,000 balance of a 1968 loan of $210,000,000 due 1974-75, $60,000,000 total of a 1970 loan due annually 1975-77, and $100,000,000 of a July 1971 loan due annually 1975-77. Under terms of the loan agreements and as a result of establishment and maintenance in trust of the Special Reserve Fund, Air Terminal Reserve Fund, and Marine Terminal Reserve Fund, annual installment payments on bank loans beginning in 1971 are to be made exclusively from net revenues available in the Consolidated Bond Reserve Fund. Loan payment and interest on loans is subject to payment of debt service on the General and Refunding, Air Terminal, Marine Terminal, and Consolidated Bonds, and to payment into the General Reserve Fund of the amount needed to maintain this Fund at its requirement of 10% par value of the bonds.

Structure: These Consolidated Bonds are due in 2008 with mandatory retirement beginning annually in 1983. Estimated overall interest and amortization on the Consolidated Bonds is at a high of over $110 million in certain years in the 1973-86 period, with debt service declining under $100 million in 1993, as shown for selected years ($ in 000):

Exhibit S-31

Year	Amortization	Interest	Total
1973	$32,112	$74,377	$105,489
1974	34,119	75,916	110,035
1975	35,886	74,782	110,668
1976	35,236	73,633	108,869
1977	36,475	72,474	108,949
1980	41,671	68,432	110,103
1986	54,223	58,255	112,478
1992	55,550	44,661	100,211
1998	57,500	27,043	84,543
2008	7,000	175	7,175

Coverage ($ in 000):

	Last 3 Fiscal Yr. Avg.	Fs. Yr. Ended 12-31-72
Net revenues	$130,600	$140,457
Est. peak interest:		
$75,916 in 1974	1.72x	1.85x
Est. peak prin. and int.:		
$112,478 in 1986	1.16	1.25

Statutory covenant against dilution of pledged revenues: A paragraph which appeared in the official statement for the Thirty-ninth Series of Consolidated Bonds which sold in February 1972, and which bonds are due in 2007, indicated that in connection with legislation which authorized the Authority to assume responsibility for the Hudson Tubes system (PATH), the Authority advised the Legislatures of both states that its credit would be impaired by such an undertaking of an anticipated perpetual deficit facility unless the states would enter into an enforceable contract with the Authority bondholders which would grant assurances against dilution of already pledged revenues and reserves by any additional passenger rail deficits

beyond those of the Hudson Tubes system. The legislation as finally adopted included these covenants. The contract prohibits the application of any revenues or reserves pledged to the bonds (which includes all existing revenues, other than rentals under the New York State commuter railroad car program, and all existing reserves) for any additional passenger railroad purpose beyond the basic Hudson Tubes, as defined, without the consent of the holders of the affected bonds unless the Authority shall have first certified the eligibility of the additional railroad, whether an extension of the Hudson Tubes or a new railroad facility. To be eligible, the Authority must determine that either the proposed additional passenger railroad facility is self-supporting or, if not, that at the end of the preceding calendar year the General Reserve Fund contained the full statutory amount and that for the ensuing 10 years the estimated average annual deficits from the proposed additional passenger railroad facility and any existing railroad facility (including the Hudson Tubes) would not in the aggregate exceed an amount equal to 1/10 of the amount in the General Reserve Fund at the prior year-end.

The statutory covenant against dilution of pledged revenues and reserves by additional passenger railroad facilities remains in effect with respect to affected bonds and remains binding on the Authority, although it does not apply to the bonds of the present Fortieth Series offering. The legislation which authorized the Authority to assume responsibility for the Hudson Tubes was amended effective 5-10-73 by New York and New Jersey. The New Jersey amendment, when introduced in the N.J. Assembly, was accompanied by a statement that the bill was intended to preclude the application of the covenant to holders of bonds

newly issued after its effective date, while maintaining in status quo the rights of the holders of bonds issued after 3-27-62 (effective date of the covenant legislation) but prior to the effective date of the amendment.

Prior to the effective date of this amendatory legislation, 16 banks, in connection with the issuance of the Series Z notes, each consented pursuant to 1962 legislation to the application for any railroad purpose authorized by the states of any revenues and reserves which have been or shall be pledged as security for the notes, in-so-far as the application would otherwise not have been permitted by reason of the limitation imposed by the statutory covenant. In accordance with the policies of both Governors and the Authority, the consent by the purchasers of Series Z notes resulted in precluding the addition of the notes to the total amount of outstanding obligations to which the statutory amendment attaches. The need for a similar consent by the purchasers of bonds of this Fortieth Series is obviated by the amendatory legislation which precludes application of the covenant to all obligations issued after 5-1-73.

It is presently intended that passenger railroad facilities authorized by that legislation be effectuated on a self-supporting basis, including substantial amounts of governmental financial aid. The total estimated cost of these rail facilities is estimated at $650,000,000 of which about $250,000,000—$300,000,000 would be financed by the Authority, with the balance to be funded from Federal and state capital grants. The Authority indicated that PATH would be the operator of the extension from Penn Station in Newark to Newark International Airport and to Plainfield in Union County, that the Long Island Railroad would operate the Penn Station-Kennedy International Airport rail link, and that the Erie-Lackawanna Railroad would operate the direct connection from Erie-Lackawanna lines in New Jersey into Penn Station in New York. The

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Authority has indicated that while the total facilities financed by the $300,000,000 capital funds are not anticipated to be self-supporting, the portion of the projects financed by the $250,000,0000-$300,000,000 Authority moneys is anticipated to be self-supporting.

The statutes which authorize rail access to Kennedy International and Newark International contains a legislative finding that these mass transportation facilities can properly be regarded as constituting a part of each air terminal, the development of which should be the responsibility of those charged with the duties of air terminal development. Bond Counsel for the Authority is of the opinion that unless the rail access projects were to meet the requirements of a permitted purpose within the meaning of the 1962 legislation, any financing of all or part of it provided by the Authority under its existing bond resolutions would constitute a violation of the statutory covenant.

Authority: The Port Authority of New York and New Jersey (its name was changed effective 7-1-72 by legislation in both states from the former Port of New York Authority) is a municipal corporate instrumentality of New York and New Jersey, created in 1921, by compact between the two states, with the consent of Congress, and provides facilities in the Port District of about 1,500 square miles which centers about New York Harbor. The Authority consists of 12 commissioners, 6 from each state, appointed by the Governor with the advice and consent of the Senate for 6-year terms. The Authority staff is now headed by Mr. Matthias E. Lukens, Acting Executive Director, appointed to this positon following the retirement on 3-31-72 of Mr. Austin J. Tobin, who had been Authority Executive Director since 1942.

Existing facilities: Authority operates: (1) all inter-state vehicular tunnels and bridges in Port District consisting of Holland Tunnel, Lincoln Tunnel, George Washington

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Bridge, Goethals Bridge, Bayonne Bridge, Outerbridge Crossing; (2) air terminal facilities consisting of John F. Kennedy International Airport, LaGuardia Airport, Newark International Airport for commercial service, and Teterboro Airport for general aviation, and heliports in downtown and midtown Manhattan; (3) marine terminal consisting of Columbia Street Marine Terminal, Port Newark, Brooklyn Port Authority Marine Terminal, Hoboken-Port Authority Marine Terminal, Erie Basin-Port Authority Marine Terminal, and Elizabeth-Port Authority Marine Terminal; (4) inland terminals consisting of the Port Authority Building, Port Authority Bus Terminal, New York Union Motor Truck Terminal, Newark Union Motor Truck Terminal, and George Washington Bus Station; (5) the Hudson Tubes railroad facility operated by the wholly-owned subsidiary PATH corporation, and (6) the World Trade Center.

Expansion: Expansion of Authority facilities include: (1) at Kennedy International expenditures by Authority and airlines to expand the International Arrival Building and Wing Building and development of a maintenance facility under which Authority expenditures in 1973 will be about $23,400,000; (2) at Newark International, a $220,-000,000 redevelopment program under which a new runway was placed in operation in 1970 and construction of 3 new terminals are proceeding; (3) at Port Newark, development of the south side of the Port along a new channel which adjoins the Elizabeth Marine Terminal in which 8 berths have been built and 2 additional berths are to be completed in 1973, and in September 1972, Authority authorized agreement with Penn Central to lease about 95 acres of undeveloped land adjoining Port Newark for a 40-year term, on which the Authority plans to build distribution buildings and pave open area at an estimated $19,000,000 cost; (4) at Elizabeth-Port Authority Marine

Exhibit S-31

Terminal, lease agreements with the Jersey Central covering 246 acres of adjoining undeveloped land executed under 1971 and 1972 lease agreements to provide additional distribution space for future containerized cargo terminals with an estimated Authority investment of $38,600,000; (5) an expansion program of the Port Authority Bus Terminal, for which $7,600,000 has been expended for land acquisition; (6) a new Journal Square transportation center in Jersey City, and a 1972 memorandum of intent between Authority and Penn Central for Authority to rehabilitate Penn Station in Newark for an estimated $12,300,000; and (7) the World Trade Center.

World Trade Center in lower Manhattan comprises twin 110-story tower buildings each 1,350 feet high surrounded by lowrise plaza buildings. At the end of 1972, more than 300 firms and organizations involved in international trade were housed in the Center. Occupancy of the North Tower began in December 1970 and the South Tower in April 1972. Despite a construction strike in the last half of 1972, tenants moved into the Northeast Plaza Building. Taking into consideration unanticipated increases in construction costs, it is presently estimated that the total cost of the World Trade Center will be about $800,000,000, an amount $100,000,000 greater than that indicated prior to the February 1972 bond offering, and $150,000,000 greater than that indicated prior to 1970 and 1971 bond offerings, and also greater than total cost estimated of $600,000,000 earlier in 1970, of $575,000,000 of a 1967 estimate, and of $525,000,000 of a 1965 estimate. Cost increases have been due to delays caused by construction, escalation, increased construction costs, and final modifications and additions to the low-rise buildings.

Additional facilities: In August 1971, the Authority and New York City executed a lease agreement for construction, financing, and leasing of a Consolidated Passenger

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Ship Terminal on the west side of Manhattan. The agreement provides that the Authority will build the terminal, lease it from the City for 20 years and finance related parking facilities at a $2,000,000 cost with the City to finance the balance of about $35,900,000. Part of the permanent facility and certain existing piers were repairs to provide interim facilities until completion of the new Terminal in the spring of 1974. Charges for passenger vessel use of the terminal are governed by tariffs calculated to make the project self-supporting over the lease term, which are published by the Authority and filed with the FMC.

On 2-8-73, the Authority Commissioners authorized construction and operation of a container cargo development project in the Red Hook section of Brooklyn on about 30 acres owned by the Authority and about 72 acres to be leased by the Authority from New York City. The Authority would lease the 72 acres for a term beginning with delivery of the first parcel and continuing for 50 years after delivery of all parcels. City would pay entire estimated construction cost of $29,000,000, and Authority pay to City a basic rental of about $2,152,000 annually over a 50-year period. If revenues also exceed base rent plus provision for Authority expenses, 50% of the excess is payable to the City.

The mass transportation rail project authorized by the states in the 1971-73 period will provide for: (1) PATH rail link connecting Newark International Airport and Penn Station in Newark; (2) extend PATH into Union County to Plainfield via Newark International Airport; (3) direct rail service to Penn Station in Manhattan for Erie-Lackawanna riders including equipment yard in Seacaucus and a new Hackensack River Bridge. These projects are expected to be completed by the end of 1977, as well as the rail link from Manhattan to Kennedy International.

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	Fiscal Years Ended Dec. 31			% Change	
	1970	1971	1972	1971	1972
Operations:					
Total bridges & tunnels:					
Traffic (000)	148,281	154,362	159,476	4.1	3.3
Toll revenues (000)	$ 75,891	$ 78,492	$ 80,620	3.4	2.7
Commercial airports:					
Plane movements	868,095	846,800	860,000	– 2.5	1.5
Total passengers (000)	37,402	38,025	41,713	1.7	9.7
PATH passengers (000)	38,954	38,877	40,282	– 0.2	3.6
All marine terminals:					
Ship arrivals	N.R.	3,428	3,979	—	16.1
General cargo, long tons (000)	12,309	11,339	12,183	– 7.9	7.4
Financial Operations ($ in 000):					
Gross operating revenue	$ 255,318	$ 279,935	$ 319,835	9.6	14.2
Gross revenue & income	271,385	300,279	339,618	10.6	13.1
Oper. & maint. expense	144,988	175,333	199,161	20.9	13.6
Net revenues	126,397	124,946	140,457	– 1.2	12.4
Interest on funded debt	26,346	29,441	38,856	11.7	32.0
Int. & mandatory redemp. pyts.	53,667	52,454	63,358	– 2.3	20.8
Times covered	2.36	2.38	2.22	—	—
Safety margin (%)	26.8	24.1	22.7	—	—
Balance sheet ($ in 000):					
Invested in facilities ...	$2,398,502	$2,760,810	$3,047,507	15.1	10.4
General Reserve	127,069	144,675	156,681	13.8	6.3
Gen. & ref. Spec. Reserve	19,268	18,658	17,551	– 3.2	– 5.9
Air Terminal reserve ..	33,069	32,212	27,489	– 2.3	–24.7
Marine Terminal reserve	3,954	3,773	3,280	– 4.6	–23.1
Consolidated Bond reserve	2,681	253	7,101	–95.7	—
Total reserves	186,041	199,671	212,102	7.3	6.2
Total bond & note debt	1,270,691	1,446,748	1,566,810	13.8	6.3
Bank loans	200,000	265,000	230,000	32.5	–23.2
Total debt	1,470,691	1,711,748	1,796,810	15.1	5.0

Largest components of investment in facilities, 12-31-72:

World Trade Center	$659,500,000
Kennedy International	653,200,000
Newark International	276,200,000
George Washington Bridge	213,000,000
Hudson Tubes (PATH)	199,400,000
Lincoln Tunnel	198,000,000

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Recent Developments: The PATH system was struck and non-operating for about a 2-month period from 4-1-73 to 6-3-73. On 6-14-73, PATH announced an increase in the basic fare from 30¢ to 50¢ effective 7-29-73.

Other Developments: Various actions or litigation are pending with respect to certain of the Authority's facilities or for certain statutory provisions.

On 7-20-70, the New York State Attorney General instituted a lawsuit on behalf of the State of New York Supreme Court, Nassau County, against the Authority and 58 foreign and domestic airlines using La Guardia and Kennedy International Airports. The action seeks to require, and directs the Authority to require, air carriers operating jets to equip their aircraft with noise suppressors to reduce aircraft noise outside the boundaries of the airports to specified levels. Research, development, and testing of methods to reduce aircraft noise is being conducted by aircraft manufacturers and the Federal Government.

On 7-30-70, the Attorney General also instituted a lawsuit on behalf of the State in New York Supreme Court, New York County, alleging that the Authority has caused or permitted fuel oil to be discharged into Jamaica Bay through the storm and sanitary sewer system at Kennedy International and, by extending a runway into the Bay, has interfered with normal tidal flows to disrupt the Bay's ecology, and seeking to enjoin the alleged discharge and the alleged disruption of the ecology.

In December 1961, owners of properties instituted an action in Supreme Court, Queens County, against the Authority and 38 airlines operating out of Kennedy International, alleging that airport noise diminished the value of their properties. As against the Authority, plaintiffs seek to recover alleged damages of 20% of the market value of their properties, and for a period prior to the action, alleged

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damages of 20% of rental value of properties. With respect to the Authority, allegations that flights constitute trespass, nuisance, and governmental taking of private property have been held by the State trial and appellate courts to be barred for the period prior to December 1960.

In May, 1967, President of the N.Y. District Council of the ILA began a suit against the United States, Authority, and New York City in a U.S. District Court seeking to prevent effectuation of the World Trade Center, the plaintiff contending that demolition of piers in construction of the Center violated "rights" of ILA members to be employed on waterfront property. On 3-28-72, the District Court dismissed the action against all parties, the U.S. Court of Appeals for the Second Circuit affirmed the District Court judgment on 10-30-72, and plaintiffs' petition for a writ of certiorari to review the decision was denied by the U.S. Supreme Court on 4-16-73.

Still technically pending is litigation instituted in September 1964 by plaintiffs and intervenors who sought to prevent effectuation of the Center and alleged, among other things, that the legislation authorizing the Center is unconstitutional. Their complaint as to these issues was incorporated into a 1965 litigation where these constitutional challenges were rejected. Intervenors appealed to the Appellate Division of the Court from the New York State Supreme Court's dismissal of portions of their complaint demanding an injunction against the taking of their property on the site of the Center. Title to the properties vested finally in the Authority by order of the Supreme Court, New York County, which was affirmed in a July 1966 Court of Appeals decision.

On 3-4-71 and 3-9-71; identical class actions were begun in the U.S. District Court for the Southern District of New York and the U.S. District Court for the District of New

Exhibit S-31

Jersey against the Authority, each of its Commissioners, and its Executive Director challenging the validity of the 1962 covenant against dilution of pledged revenues and reserves by additional passenger railroad deficits. The plaintiffs further sought an order requiring the Authority to formulate and submit to the Court, or to a special master to be appointed by the Court, a plan for development of mass transportation facilities in the Port District as requested by both Governors.

On 4-23-71, the Authority, its Commissioners and Executive Director, and Governor of New York jointly moved to dismiss the New York Action on the grounds that the plaintiffs failed to state a cause of action on which relief can be granted and that the Federal Court lacked jurisdiction. On 5-28-71, parties in the New York action stipulated to dismiss the action as to Governor Rockefeller and to permit the State's Attorney General to intervene in support of the constitutionality of the 1962 covenant. The U.S. District Court for the Southern District granted defendants' motion to dismiss the complaint on 7-28-71, the U.S. Court of Appeals for the Second Circuit affirmed this judgment on 3-24-72, rehearing was denied on 5-30-72, and plaintiff's petition for writ of certiorari to review the Court of Appeals decision was denied by the U.S. Supreme Court on 11-6-72. The action instituted in the U.S. District Court for the District of New Jersey was administratively terminated pending final dismissal of the New York action, and no further proceedings have been initiated.

Complaints containing substantially identical allegations and asking relief similar to that sought in the complaints in the Federal actions were filed in the Superior Court of New Jersey, Law Division, Bergen County, in May 1972, and in New York Supreme Court, New York County, in

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January 1973. In the New Jersey action, the plaintiff is described as a New Jersey resident, and defendants named were the Authority, its Commissioners, and Governor of New Jersey. On motion made by New Jersey's Attorney General, the complaint was dismissed as to Governor Cahill. The New York action has been instituted in the form of a class action against the Authority as sole defendant by one named plaintiff who was also a plaintiff in the New York action filed in the Federal court in 1971. Both state court actions are still pending.

Excerpt from Exhibit S-36

Dated: November 16, 1970 BLYTH & Co., INC.

Preliminary Circular—Subject to change

New Issue—To be negotiated

Moody's Rating—A

Standard & Poor's Rating—

$50,000,000

THE PORT OF NEW YORK AUTHORITY

CONSOLIDATED BONDS

THIRTY-SIXTH SERIES—(FIRST INSTALLMENT)

Dated: November 1, 1970

Due: November 1, 2005, as shown below

The Thirty-Sixth Series Bonds becoming due on November 1, 1981 and on any date thereafter are redeemable prior to maturity, both at the option of The Authority and according to a fixed schedule for mandatory periodic retirement, on November 1, 1980 and on any interest payment date thereafter, in whole or in part, at the following redemption prices specified below, plus accrued interest.

Redemption Dates (Both Dates Inclusive)	Redemption Prices: Optional Redemption	Redemption Prices: Mandatory Redemption
November 1, 1980 to November 1, 1982;	104%	103%
Thereafter to November 1, 1985;	103%	102%
Thereafter to November 1, 1988;	102%	101%
Thereafter to November 1, 1991;	101%	100%
Thereafter to maturity	100%	100%

Principal and semi-annual interest (May 1 and November 1) payable at the principal office .

Coupon Bonds, in the denomination of $5,000; or as fully registered Bonds, in the denomination of $5,000 or multiples thereof.

Excerpt from Exhibit S-36

General Counsel and Bond Counsel are of the opinion that, under the Constitution of the United States of America now in force, interest on The Port of New York Authority Consolidated Bonds, Thirty-sixth Series, First Installment, presently being offered for sale, is exempt from all income taxes now or hereafter imposed by the United States unless such taxes should be consented to by the States of New York and New Jersey and that such interest is, under the existing Acts of Congress, exempt from present Federal income taxes, provided, however, that no opinion is expressed herein with respect to the exemption from taxation of interest on any Bond or Bonds of said Thirty-sixth Series, First Installment, for any period during which such Bond or Bonds are held by a substantial user (or a related person) of airport, dock, wharf, mass commuting facilities, parking facilities, or storage or training facilities directly related to any of the foregoing, provided by the Authority from the proceeds of the Bonds, within the meaning of Section 103 (c) (7) of the Internal Revenue Code. General Counsel and Bond Counsel are also of the opinion that the said bonds and the interest thereon are exempt, under the existing Compact and supplementary legislation, from any and all taxation (except estate, inheritance and gift taxes) now or hereafter imposed thereon by or under authority of the State of New York or the State of New Jersey or by any political subdivision thereof.

AMOUNT, RATE, MATURITY, PRICE

$50,000,000 .....% Term Bonds
due November 1, 2005 .....%
(Plus Accrued Interest)

The Thirty-Sixth Series Bonds are being offered for the purpose of financing capital expenditures in connection with the Authority's airports, docks, wharves, mass commuting facilities, parking facilities and storage or training facilities, and for refunding all or any part of outstanding Consolidated Notes, Series W and Series X, substantially all of which have been issued for the aforesaid purpose. No part of the proceeds of the First Installment of Consolidated Bonds Thirty-Sixth Series shall be used for the Port of New York Authority World Trade Center.

Excerpt from Exhibit S-36

The Bonds shall be direct and general obligations of the Authority, for which the full faith and credit of the Authority are pledged, secured equally and ratably with all other Consolidated Bonds heretofore or hereafter issued by a pledge of (a) the net revenues of the Authority from the Hoboken-Port Authority Marine Terminal, the Brooklyn-Port Authority Marine Terminal, the Erie Basin-Port Authority Marine Terminal, the Elizabeth-Port Authority Marine Terminal, The Port Authority-West 30th Street Heliport, the Port Authority-Downtown Manhattan Heliport, the Hudson Tubes (also known as Port Authority Trans-Hudson or "PATH"), the World Trade Center (after construction) and any additional facilities which may hereafter be financed or refinanced in whole or in part through the medium of Consolidated Bonds, (b) the net revenues of the Authority from all other of its existing facilities (not including cars acquired under New York State's Commuter Car Program,) subject to (but only to) pledges heretofore made and liens heretofore created in favor of outstanding General and Refunding Bonds, Air Terminal Bonds and Marine Terminal Bonds, (c) the General Reserve Fund of the Authority (authorized by Chapter 5 of Laws of New Jersey of 1931 and Chapter 48 of the Laws of New York of 1931, as amended) equally with other obligations of the Authority secured by that Fund, and (d) the Consolidated Bond Reserve Fund established in connection with Consolidated Bonds.

The Thirty-Sixth Series Bonds are offered when, as and if issued, and subject to the approval of Sidney Goldstein,

Excerpt from Exhibit S-36

General Counsel of the Authority and by Hawkins, Delafield & Wood, Bond Counsel for the Authority. Delivery of the Bonds is anticipated on or about .

Description of The Port Authority

The Port Authority is a municipal corporate instrumentality of the States of New York and New Jersey, created in 1921 by Compact between the two States, with the consent of the Congress of the United States. In the Compact the two States recited their confident belief that a better coordination of the terminal, transportation and other facilities of commerce in the Port of New York would result in great economies benefiting the nation as well as the States and that the future development of such facilities would require the cordial cooperation of the States in the encouragement of the investment of capital and in the formulation and execution of necessary plans. They recited that such result could best be accomplished through the cooperation of the two States by and through a joint or common agency, and to that end, after pledging, each to the other, faithful cooperation in the future planning and development of the Port of New York, they created the Port of New York District and The Port of New York Authority.

In general, the purpose of the States in establishing the Authority was to provide transportation, terminal and other facilities of commerce within the Port of New York District and for such purposes they have from time to time authorized specific facilities and have given the Authority power to borrow money upon its bonds or other obligations and to make charges for the use of such facilities. The Port District comprises an area of about 1,500 square miles in both States, centering about New York Harbor. The Port District includes the Cities of New York and Yonkers in New York State, Newark and Jersey City in New Jersey and over 200 other municipalities, including all or part of seventeen counties, in the two States.

Excerpt from Exhibit S-36

Purpose

Capital expenditures in connection with the Authority's airports, docks, wharves, mass commuting facilities, parking facilities and storage or training facilities directly related to any of the foregoing and for refunding all or any part of outstanding (a) Consolidated Notes, Series W, issued for the aforesaid purposes, and (b) Consolidated Notes, Series X, substantially all of which have been issued for the aforesaid purposes, with the balance of the proceeds of such Series X Notes, if any, to be used for purposes of capital expenditures in connection with the Authority's tunnels and bridges. No part of the proceeds of the First Installment of Consolidated Bonds, Thirty-sixth Series, shall be used for the World Trade Center nor for any Authority facilities except those specified above or for which said outstanding Consolidated Notes have been issued.

Security

Consolidated Bonds are direct and general obligations of the Authority and the full faith and credit of the Authority are pledged to the payment of debt service thereon.

Consolidated Bonds may be issued from time to time in such series and installments (in addition to the present offering) as the Authority may determine, but only for purposes for which the Authority is authorized by law to issue bonds secured by a pledge of its General Reserve Fund. So long as any bonds of the present offering are outstanding, Consolidated Bonds may be issued for purposes in connection with additional facilities (in addition to those for which it has already issued bonds secured by a pledge of the General Reserve Fund) only if the Authority has first certified its opinion that such issuance will not, among other things, materially impair its ability to fulfill its undertakings to the holders of Consolidated Bonds.

The Authority may not issue any Consolidated Bonds (except bonds issued to refund other Consolidated Bonds or

bonds of prior issues now outstanding) except under one or another of three conditions, each of which requires that a certain future calendar year's debt service is met one and three-tenths (1.3) times by certain revenues.

All Consolidated Bonds, including any which may hereafter be issued, are equally and ratably secured by a pledge of the net revenues of the following facilities in the manner and to the extent provided in the Consolidated Bond Resolution: (a) the Hoboken-Port Authority Marine Terminal, the Elizabeth-Port Authority Marine Terminal, the Port Authority-West 30th Street Heliport, the Port Authority-Downtown Manhattan Heliport, the Hudson Tubes, and the World Trade Center (after construction), (b) the Port Authority's existing six bridges and tunnels, two union motor truck terminals, bus terminal, Columbia Street Marine Terminal, and Inland Terminal No. 1, subject to the pledge heretofore made of such revenues in favor of General and Refunding Bonds, (c) the Port Authority's other existing four air terminals, subject to the pledge heretofore made of such revenues in favor of Air Terminal Bonds, (d) Port Newark, subject to the pledge heretofore made of such revenues in favor of Marine Terminal Bonds, and (e) any additional facility which may be hereafter financed in whole or in part through the medium of Consolidated Bonds. So long as any bonds of a prior issue remain outstanding which have a first lien on the net revenues of any existing facility, such revenues must be applied as provided in the resolution establishing such prior issue. The application of net revenues prescribed in each such resolution is for payment of the debt service upon all bonds of such prior issue, with all remaining balances payable into a special reserve fund established by such resolution for bonds of such prior issue except such amounts as may be necessary to maintain the General Reserve Fund in its statutory amount. To the extent legally available and necessary for such purpose, amounts in such

special reserve funds, and in the Consolidated Bond Reserve Fund described below, are to be applied to the payment of debt service on the bank loan referred to hereinafter. The bank loan contemplates that upon providing in trust for the payment in full of principal and interest to the respective sinking fund redemption dates of the Authority's General and Refunding Bonds, Air Terminal Bonds and Marine Terminal Bonds, the net revenues from the above mentioned facilities will be applied to debt service on the Consolidated Bonds and Notes and all remaining balances, except such amounts as may be necessary to maintain the General Reserve Fund in the prescribed amount, will be paid into the Consolidated Bond Reserve Fund. It is presently expected that such payments in trust will be made by year end 1970. Under the terms of the loan, no Authority bonds would have to be paid or redeemed in advance of their scheduled redemption.

All Consolidated Bonds are further secured by a pledge of the moneys in the Consolidated Bond Reserve Fund established by the Consolidated Bond Resolution, in the manner and to the extent set forth therein, and by a pledge of the General Reserve Fund on an equal footing with other obligations of the Authority, in the manner and to the extent provided therein.

The Consolidated Bond Reserve Fund

A special fund is created by the Consolidated Bond Resolution as additional security for all Consolidated Bonds. Into this fund is to be paid the balance of all net revenues upon which at the time Consolidated Bonds have a first lien, except such amounts as may be required to maintain the General Reserve Fund at its statutory amount.

The moneys in the Consolidated Bond Reserve Fund may be accumulated or applied only to the purposes stated in the Consolidated Bond Resolution, which include the payment of debt service and retirement of Consolidated Bonds

Excerpt from Exhibit S-36

(with certain limitations) and other purposes. The other purposes, so long as any bonds of the present offering are outstanding, must be related to bonds secured by a pledge of the General Reserve Fund or facilities financed by such bonds, but not necessarily related to Consolidated Bonds, or facilities the net revenues of which are pledged in support of Consolidated Bonds. Moneys in the Consolidated Bond Reserve Fund may be applied to the payment of debt service on the bank loan described hereinafter.

THE GENERAL RESERVE FUND

The General Reserve Fund was established pursuant to Chapter 5 of the Laws of New Jersey of 1931 and Chapter 48 of the Laws of New York of 1931, which have been amended and supplemented.

Under the statutes authorizing the pledge of the General Reserve Fund, in all cases where the Authority has raised or may raise moneys to finance or refinance any of its present facilities, or any additional terminal or transportation facilities by the issue and sale of bonds legal for investment as limited and defined in the applicable statutes, the surplus revenues, as defined therein, from such facilities are required to be pooled by the Authority and applied to the establishment and maintenance of a General Reserve Fund in an amount equal to 10% of the par value of all such outstanding bonds legal for investment, as so defined. The Bonds of the present offering will be, and all of the outstanding bonds and notes of the Authority, other than the State Guaranteed Commuter Car Bonds and the bank loans described hereinafter, are, bonds legal for investment within the statutory definitions; also all of the Authority's existing facilities (not including cars acquired under the aforesaid New York State Commuter Car Program) have been financed in whole or in part by bonds legal for investment within the meaning of the General Reserve Fund statutes.

Excerpt from Exhibit S-36

The statutes permit the General Reserve Fund to be pledged in whole or in part by the Authority or applied by it to the repayment with interest of any moneys raised upon any such bonds legal for investment, and permit the Authority to apply such moneys in the General Reserve Fund to the fulfillment of any other undertaking assumed to or for the benefit of the holders of any such bonds.

The Authority's power to use and invest the moneys in the General Reserve Fund at any time is curtailed within narrower limits under existing agreements that the maximum which the statutes permit (without impairing, however, any pledge heretofore made in favor of holders of General and Refunding, Air Terminal and Marine Terminal Bonds). Application of the General Reserve Fund is by such agreement restricted to purposes in connection with bonds secured by a pledge of the General Reserve Fund, and except to the extent that the combined balances in the General Reserve Fund and certain other debt reserve funds of the Authority (including the Special Reserve Fund, Air Terminal Reserve Fund, and Marine Terminal Reserve Fund established in connection with General and Refunding, Air Terminal and Marine Terminal Bonds, respectively, as well as the Consolidated Bond Reserve Fund) may at the time exceed the next two years' debt service on all bonds then outstanding which are secured by a pledge of the General Reserve Fund, the Authority covenants (subject to prior pledges) that General Reserve Fund moneys may not be used for any purpose if at the time there are any other moneys of the Authority available for that purpose and may not be used for the prepayment of debt service before due, and must be held in the form of cash or in obligations of (or guaranteed by) the United States.

At the present time the General Reserve Fund is pledged in support of all outstanding bonds and notes of the Authority other than State Guaranteed Commuter Car

Excerpt from Exhibit S-36

Bonds and the bank loan described hereinafter. In addition, it has been pledged in support of all Consolidated Bonds now or hereafter issued.

In connection with the pledge of the General Reserve Fund made in support of outstanding bonds and notes and the bonds of the present offering, the Authority has reserved the right to pledge the General Reserve Fund as security for any bonds, notes or other evidences of indebtedness whatsoever hereafter issued by the Authority as security for which it may at the time be authorized by law to pledge the General Reserve Fund and to use the moneys in the General Reserve Fund to fulfill any of its undertakings in connection with bonds, notes or other evidences of indebtedness secured by a pledge of such Fund, except that the Fund may not so long as any of the Bonds of the present offering are outstanding be pledged in support of bonds, other than Consolidated Bonds, to be issued in connection with an additional facility (in connection with which the Authority has not previously issued bonds secured by such pledge), unless the Authority has first certified its opinion that such pledge will not, among other things, materially impair its ability to fulfill its undertakings to the holders of Consolidated Bonds.

All bonds, notes or other evidence of indebtedness now secured by a pledge of the General Reserve Fund are secured on an equal footing and the Consolidated Bond Resolution provides that no greater rights in or to the General Reserve Fund may hereafter be granted to the holders of any such other obligations that are now granted to the holders of the bonds issued pursuant to such resolution.

The surplus revenues of all facilities of the Authority now in operation (not including cars acquired under the aforesaid New York State Commuter Railroad Car Program) are payable into the General Reserve Fund to the extent required by the statutes.

Excerpt from Exhibit S-36

The statutory amount of the General Reserve Fund, to the establishment and maintenance of which the Authority is required to apply the surplus revenues of its facilities financed and refinanced by bonds legal for investment, as defined in the statutes, is 10% of the par value of such bonds currently outstanding. As of the close of each calendar year the Authority has determined such amount and paid any surplus revenues available therefor into the Fund to the extent required to maintain it at its then statutory amount. The balance of such Fund on December 31, 1969 was $120,206,000.

Sources of Payments Into the Fund

The surplus revenues of all facilities of the Authority now in operation (not including cars acquired under the aforesaid New York State Commuter Railroad Car Program) are payable into the General Reserve Fund to the extent required by the statutes. The four classes of present facilities from which the Authority may derive surplus revenues payable into the General Reserve Fund are:

A. Those upon the net revenues of which Consolidated Bonds constitute a first lien and charge at the present time, which are

   Hoboken-Port Authority Marine Terminal
   Brooklyn-Port Authority Marine Terminal
   Erie Basin-Port Authority Marine Terminal
   Port Authority-West 30th Street Heliport
   Port Authority-Downtown Manhattan Heliport
   Elizabeth-Port Authority Marine Terminal
   Hudson Tubes
   World Trade Center (after construction)

B. Those upon the net revenues of which the aforesaid Air Terminal Bonds constitute a first lien and charge at the present time, which are

   La Guardia Airport

Excerpt from Exhibit S-36

Newark Airport
John F. Kennedy International Airport
Teterboro Airport

C. That upon the net revenues of which the aforesaid Marine Terminal Bonds constitute a first lien and charge at the present time, which is
Port Newark

D. Those upon the net revenues of which the aforesaid General and Refunding Bonds constitute a first lien and charge at the present time, which are the
Holland Tunnel
Lincoln Tunnel
George Washington Bridge
Bayonne Bridge
Goethals Bridge
Outerbridge Crossing
Port Authority Inland Terminal No. 1 (Port Authority Bldg.)
Columbia Street Marine Terminal
New York Union Motor Truck Terminal
Newark Union Motor Truck Terminal
Port Authority Bus Terminal

The Bank Loan

In December 1968, the Authority obtained a loan from banks and trust companies located in New York and New Jersey in the amount aggregating $210,000,000, with interest at 4¼% per annum, to mature in 1975, for application to the capital cost of facilities of the Authority financed or refinanced in whole or in part by Consolidated Bonds. The loan, including interest, is payable from net revenues legally available therefor in the Special Reserve Fund, Air Terminal Reserve Fund, Marine Terminal Reserve Fund and Consolidated Bond Reserve Fund as provided in the Authority's bond resolutions establishing such funds. Under

Excerpt from Exhibit S-36

the terms of the loan, annual amortization installments of up to $35,000,000 are to be paid to the extent net revenues are legally available therefor. Payment of the loan and interest thereon is subject in all respects to the payment of debt service on the Authority's General and Refunding Bonds, Air Terminal Bonds, Marine Terminal Bonds and Consolidated Bonds and Consolidated Notes, as required by the applicable provisions of the Authority's bond resolutions, and to the payment into the General Reserve Fund of the amount necessary so as to maintain such Fund at the amount specified in the General Reserve Fund statutes. Neither the loan nor the interest thereon is secured by or payable from the General Reserve Fund.

Rate Powers and Covenants

As a result of legislation contained in Chapter 47 of the Laws of New York of 1931 and Chapter 4 of the Laws of New Jersey of 1931; in Chapter 802 of the Laws of New York of 1947 and Chapter 43 of the Laws of New Jersey of 1947; and in Chapter 209 of the Laws of New York of 1962 and Chapter 8 of the Laws of New Jersey of 1962 (which authorized the World Trade Center-Hudson Tubes Project), the two States covenanted with each other and with the holders of any bonds of the Authority secured by its General Reserve Fund (including Consolidated Bonds), that the two States will not diminish or impair the power of the Authority to establish, levy, and collect tolls, rents, fares, fees, or other charges, in connection with any facility owned or operated by the Port Authority the revenues of which shall have been pledged in whole or in part as security for such bonds. All present Port Authority facilities (not including cars acquired under the aforesaid New York State Commuter Railroad Car Program) and the charges therefor are covered by these statutory covenants, so long as such bonds or other obligations remain outstanding.

Excerpt from Exhibit S-36

Under the 1962 Statutes the States also have covenanted that they will not diminish or impair the Port Authority's power to determine the quantity, quality, frequency or nature of the service provided in connection with such facility.

The Authority has covenanted with the holders of Consolidated Bonds to establish charges in connection with facilities whose net revenues are pledged as security for such bonds (all present Authority facilities not including cars acquired under the aforesaid New York State Commuter Railroad Car Program) to the end that at least sufficient net revenues may be produced therefrom to provide for the debt service on all Consolidated Bonds, but in the event that such net revenues are insufficient to provide for the debt service on Consolidated Bonds, to make good any deficiency out of the General Reserve Fund or other available revenues, moneys or funds and for that purpose to establish charges in connection with facilities the surplus revenues of which are payable into the General Reserve Fund (including all its existing bridges and tunnels, air, marine and inland terminals, the Hudson Tubes, and the World Trade Center when constructed) to the end that combined surplus revenues may be produced therefrom at least sufficient to cover debt service on Consolidated Bonds through the medium of the General Reserve Fund.

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Excerpt from Exhibit S-38

QUOTATIONS OF AUTHORITY BONDS

NEW YORK TIMES
FEBRUARY 7, 1975

		Due	Bid	Asked	Bid Chg.
Indiana Toll Road	3½%	1/1/94	74½	76½	+2½
Kansas Turnpike	3⅜%	10/1/94	74	77	+2
Mass Port	3.80%	2004	66	69	—
Mass Port	6%	2011	87	91	—
Port of N. Y.	4¾%	2003	71	74	+½
Port of N. Y.	5½%	2008	77½	80½	+½
Port of N. Y.	6%	2008	86	90	—1

Excerpt from Exhibit S-39

QUOTATIONS OF AUTHORITY BONDS

NEW YORK TIMES
FEBRUARY 8, 1975

		Due	Bid	Asked	Bid Chg.
Indiana Toll Road	3½%	1/1/94	77½	80½	+3
Kansas Turnpike	3⅜%	10/1/94	74	77	—
Mass Port	3.80%	2004	66	69	—
Mass Port	6%	2011	88	92	+1
Port of N. Y.	4¾%	2003	71½	74½	+½
Port of N. Y.	5½%	2008	77½	80½	—
Port of N. Y.	6%	2008	86	90	—

Excerpt from Exhibit S-40

PORT OF NEW YORK AUTHORITY

HEARINGS

Before

SUBCOMMITTEE No. 5

of the

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

EIGHTY-SIXTH CONGRESS

Second Session

November 29, 30, December 1 and 2, 1960

Serial No. 24

Part 1

Mr. Maletz. Mr. Tobin, at a later stage of this hearing, the sub-committee will ask you a number of questions pertaining to the port authority's activities in connection with the rail commuter problem in the New York-New Jersey area. At this point, I will inquire only as to events leading up to passage of legislation in 1959 of a New York State railroad commuter car financing program. You are familiar with that legislation, are you not?

Mr. Tobin. Yes, sir, I am quite familiar with it.

Mr. Maletz. Do you know a Robert W. Purcell?

Mr. Tobin. Very well.

• • •

Mr. Maletz. In 1959, was he adviser to Governor Rockefeller of New York on the New York commuter rail problem?

Excerpt from Exhibit S-40

Mr. Tobin. He was. The latter part of 1958 and the early part of 1959—and then he resigned.

• • •

Mr. Maletz. Did Mr. Purcell, after extensive study, propose a plan or suggest initially a plan whereby the port authority would purchase commuter railroad equipment and lease the same to the Long Island Railroad and the New York Central Railroad for 25 years at a rental which would reimburse the port authority for its total cost, including carrying charges, over the terms of the lease?

Mr. Tobin. He did. And that plan was enacted into law in both States, and I helped him work it out.

Mr. Maletz. Let me ask you this next question. Listen very carefully. Was it part of Mr. Purcell's original proposal that the port authority should finance this railroad commuter car program?

Mr. Tobin. We discussed that.

Mr. Maletz. Would you answer the question?

Mr. Tobin. Yes, I am answering it. We discussed that.

Mr. Maletz. Was it part of Mr. Purcell's original proposal that the port authority should finance this railroad commuter car program?

Mr. Tobin. No, it was not.

Mr. Maletz. It was not?

Mr. Tobin. It was not, in the sense that Mr. Purcell and I discussed that possibility. We discussed it for weeks. And he was exploring the possibilities of that, and I was giving him the reasons why, as a matter of the pledging of the general reserve fund, that was not legally or financially possible.

Mr. Maletz. Is it your testimony, under oath—

Mr. Tobin. Oh, come, come. I am an officer of the State of New York. Do not give me that. I am here and I will

testify to any facts you want. But do not give me that stuff of, is it under oath. I am testifying under oath. I am a lawyer and an officer of the State of New York, and I am very clear about it. And do not tell me I am testifying under oath.

The Chairman. Mr. Marshall, will you see that order is maintained here? And please do not make any such outbursts, Mr. Tobin.

Mr. Tobin. Then ask your counsel not to throw that kind of gratuitous slur at me. I am not here to take it.

The Chairman. If you—

Mr. Tobin. And I do not intend to.

The Chairman. If you object to a question, you have counsel. He can object. And then the Chair will pass upon it. The Chair will pass upon it.

Mr. Tobin. Then let us drop this police court stuff of you realize you are testifying under oath.

The Chairman. Are you now making any charges against this committee?

Mr. Tobin. Yes, I am objecting very much to that crack. I do not like it. I am not accustomed to it.

The Chairman. Then your counsel is here to protect your interests and your rights. Now, Mr. Maletz.

Mr. Maletz. Mr. Chairman—

Mr. Tobin, did Mr. Purcell propose initially that the port authority should finance this railroad car commuter program?

Mr. Tobin. Mr. Purcell asked me to discuss that with him.

Mr. Maletz. Did he propose it?

Mr. Tobin. And I did.

Mr. Maletz. Did he propose such a plan?

Mr. Tobin. I am answering it my own way. He asked me to discuss that with him, and he asked me questions.

We explored the possibility of whether or not such a plan was possible. But we never reached any point, as your question indicates, where he submitted a proposal to me that we do that.

Mr. Maletz. Did he suggest at any time in February or March of this year that the port authority should finance the railroad commuter car program?

Mr. Tobin. I say we discussed that, and he told me he wanted to discuss that. And we did.

Mr. Maletz. Did he ever make that suggestion?

Mr. Tobin. Well, I am saying, I think, Mr. Maletz, that we are saying about the same thing. I think there were discussions. He asked me to meet him. We sat down, and he said: "I would like to explore with you the possibilities of pledging the port authority general reserve funds to purchase the railroad equipment."

And I explained the reason for him, and had a long exchange of correspondence with him, over the weeks and weeks as to why that was legally and financial impossible. And a matter which he then completely accepted, and stated with the greatest strength, in his report.

The Chairman. In other words, at the beginning, at least, he made that proposal, and you objected to it?

Mr. Tobin. Yes, Mr. Chairman.

Mr. Maletz. Was it estimated that under Mr. Purcell's original suggestion, about $200 million of railroad commuter cars, could be purchased?

Mr. Tobin. The figure escapes me. It was a large figure, Mr. Maletz. I can verify that.

Mr. Maletz. Would it be about $200 million?

Mr. Tobin. It seems high to me, because what we have been working on under the statute over the past year and a half has been a project involving the purchase of $40

million in cars. We may have gotten up into the astronomy of $200 million. But I am not clear on it.

Mr. Maletz. Was it Mr. Purcell's reaction that such a program, under port authority financing, could provide new cars for commuters in the New York area sometime during 1960?

Mr. Tobin. We were talking in the beginning of 1959. And I thing we both believed and hoped that we could work out a program together, and we finally did—that we would begin to supply cars in 1960. I think we both—that is a narrative recollection upon my part. But I would assume that was our timing.

Mr. Maletz. Mr. Tobin, I take it that you, as an officer of the port authority, were greatly exercised over Mr. Purcell's suggestion to require the port authority to finance the railroad commuter program.

Mr. Tobin. Well, it was financially and legally impossible. And I was greatly concerned that he, with the respect I had for him, and he was speaking for the Governor's office, should think that the general reserve fund could be pledged for that purpose, with all the perfectly terrible credit and financial consequences of such a matter. And I was very much concerned about it.

Mr. Maletz. I take it that you, speaking for the port authority, took the position that such a proposal would terribly impair the port authority's credit?

Mr. Tobin. Oh, yes. And I took that position not only with Mr. Purcell, but with the Governor himself, and with all of us concerned about it. There were great conversations. Our board was in them. And in the discussions. And we discussed it with the investment bankers, down in the street. And it was quite—there were weeks of very earnest and serious discussions, which resulted in the final

plan worked out, in Mr. Purcell's report, in which he came to recognize that the general reserve fund could not possibly be pledged for such purpose without destroying the port authority's credit.

And you will find that his report, be it February or March of 1959, expressly says that.

Mr. Maletz. You mean the report of March 16?

Mr. Tobin. Bob Purcell's final report.

Mr. Maletz. I see. Now, did you—

Mr. Tobin. Which was the report that recommended the legislation that was enacted.

Mr. Maletz. We are going to go through all these steps in a moment, Mr. Tobin.

Did you in the latter part of February 1959 ask various of the principal investment bankers who handled port authority bonds to attend a meeting at the First National City Bank the following day, March 1?

Mr. Tobin. I met with all the investment bankers. I met with what we would call the syndicate heads, and with our banking advisers, who are the National City Bank, and discussed this problem.

Now, in the normal course, that is the type of meeting that I would call. And I could go back through our files, and if you have files from the National City Bank that shows that that is the time of that meeing, then undoubtedly it is—that would be an accurate report.

Mr. Maletz. Did you call the meeting?

Mr. Tobin. I would assume that I probably asked the National City Bank to call the meeting, which would be the normal way to proceed. I would ask Mr. Pfeffer, the vice president of government and municipal securities at the National City Bank, who is in a personalized sense our general banking consultant and adviser—I would ask him to call such a meeting.

Excerpt from Exhibit S-40

Mr. Maletz. At this particular meeting, were representatives, if you recall, of the investment banking firms of Harriman Ripley; Halsey, Stuart; Blyth & Co.; Glore, Forgan, & Drexel present.

Mr. Tobin. Those would be the syndicate leaders. I am not saying I remember that—though if the National City Bank memo that you have says that is who was there, that is in the normal course. I can add that is about who would be there.

Mr. Maletz. And I take it these investment banking concerns are the principal underwriters of port authority bond issues.

Mr. Tobin. Usually a syndicate—with the sizes of our issues, it splits into two syndicates. Generally, as you had typically in the one last week, Halsey, Stuart is the head of one syndicate, and Whitely, Howard are the other—and Forgan and Harriman, Ripley are parts of one syndicate or another.

Mr. Maletz. I see. At this meeting, did you appeal to these investment bankers for help in blocking the Purcell plan to the extent that it called for port authority financing of a railroad commuter car program?

Mr. Tobin. At that meeting I outlined to them what Purcell and I were discussing, and its concerns and dangers, and it would be perfectly apparent to them. And, of course, they had taken the responsibilities for selling millions of dollars of port authority bonds to their investors. And on any matter such as this that would—if it ever should eventuate—would seriously threaten the invesments of those they had sold bonds to, as responsible bankers, and having in mind their fiduciary capacity, that was a matter in which they would have the same moral concern that I would.

Excerpt from Exhibit S-40

Mr. Maletz. Let me repeat the question. At this meeting, did you appeal to these investment bankers for help in blocking the Purcell proposal to the extent that it called for port authority financing of a railroad commuter car program?

Mr. Tobin. I object to your words, and I will not answer that question with the words in it "appeal" and "blocking." They are colored words.

Mr. Maletz. Are they colored, Mr. Tobin?

Mr. Tobin. They——

Mr. Maletz. Are they colored?

Mr. Holtzman. What is colored about the word "appeal," Mr. Tobin?

Mr. Goldstein. Excuse me, Mr. Holtzman.

Mr. Holtzman. Just a minute. What is colored about the word "appeal"?

Mr. Tobin. Well, I would rather discuss the matter in my own way. I went down there, and I outlined this situation to them, and I said here is a serious situation. And they agreed with me. I urged that in their interests, and in the interests of their investors, they stand with me in saying what would happen if the port authority ever attempted to pledge its general reserve for a commuter rapid transit cars in that context of 1959.

Mr. Maletz. Mr. Tobin, do you recall you yourself using the word "appeal"?

Mr. Tobin. No, I do not.

Mr. Maletz. I show you a letter dated March 17, 1959, from you to Mr. Joseph P. Ripley, of Harriman Ripley.

Mr. Tobin (reading):

Dear Joe.

Mr. Maletz. You can read it to yourself, and then we will read it later.

Excerpt from Exhibit S-40

Mr. Tobin (reading):

In the light of our discussion in your office on March 5 about commuter rapid transit and the port authority, I thought you would like to have the full transcript of our newspaper release.

In the course of my discussions with Governor Rockefeller and Mr. Purcell subsequent to March 5th the proposal for port authority participation on the basis of what was called "equipment trust financing" or, for that matter, suggestions for any financial assistance by the port authority in the field of commuter rapid transit was dropped. We were then able to come to this combination of State advances and bonds guaranteed by the State with the port authority simply carrying out the administrative and managerial work of the State's participation.

Thank you very much again for your letter of March 5. We were, as you know, shocked by Blyth & Co.'s refusal in this crisis to stand by the customers to whom they had sold port authority——

The Chairman. What did you say about Blyth & Co.?

Mr. Tobin (reading):

We were, as you know, shocked by Blyth & Co.'s refusal in this crisis to stand by the customers to whom they had sold port authority securities throughout the years. On the other hand, the commissioners were absolutely certain that such an attitude would be at the ends of the earth from your sense of investment responsibility. And this prompted our immediate and direct appeal for your help—which, as on so many other occasions throughout the creation and development of the authority, was immediately forthcoming.

Sincerely,

Austin J. Tobin.

Excerpt from Exhibit S-40

Mr. Maletz. Would you read that last sentence again, Mr. Tobin.

Mr. Tobin. Yes. [Reading:]

Thank you very much again for your letter of March 5. We were, as you know, shocked by Blyth & Co.'s refusal in this crisis to stand by the customers to whom they had sold port authority securities throughout the years.

Mr. Maletz. I said the last sentence.

Mr. Tobin (reading):

On the other hand, the commissioners were absolutely certain that such an attitude would be at the ends of the earth from your sense of investment responsibility. And this prompted our immediate and direct appeal for your help—which, as on so many other occasions throughout the creation and development of the authority, was immediately forthcoming.

• • •

Mr. Maletz. So you used the word "appeal," did you not?

Mr. Tobin. Yes, I did.

Mr. Maletz. At this meeting of March 1, did you appeal to the investment bankers for help in blocking the Purcell plan to the extent that it called for port authority financing of a railroad commuter car program?

Mr. Tobin. We appealed to them to bring to the attention of Mr. Purcell and the Governor, which they did, the consequences of any such ill-advised financing as that.

Mr. Holtzman. Just one question at that point.

In your previous response, you indicated that the futility of this kind of program would be "apparent" to these investment people at this National City meeting. Nevertheless, and in spite of that, you felt it necessary to appeal to them to block this plan. Is that a fair statement, Mr. Tobin?

Excerpt from Exhibit S-40

Mr. Tobin. I felt—I certainly conscientiously was obliged to call to their attention what was happening, and to urge that they advise all men in the financial field for whom both the Governor and Mr. Purcell would have the utmost respect and confidence, to acquaint Mr. Purcell with the very grievous consequences of any such proposal as that.

Mr. Maletz. Mr. Chairman, did you, sir, at this meeting of March 1, submit a suggested letter for the investment bankers to sign, disapproving the Purcell plan on the ground that it would impair the credit of the port authority?

Mr. Tobin. I do not remember submitting such a letter. As I recall it, they all wrote their own letters.

Mr. Maletz. Did you submit a suggested letter?

Mr. Tobin. I do not remember.

Mr. Maletz. You do not recall.

At this meeting, did Harriman Ripley; Halsey, Stuart; Glore, Forgan, and Drexel agree to send a letter, such as you had suggested, disapproving the Purcell plan for port authority financing of a railroad commuter car program?

Mr. Tobin. My only—Mr. Maletz, so that you and I do not get into another eruption—my only point is that I do not remember a particular meeting. I have said that. I have not any doubt there was such a meeting. I had innumerable meetings with the investment bankers during that period.

So that such meetings as you describe were held, and would be held again in similar circumstances. But I am only saying—you asked me was there this meeting on March 1 or whatever it was. And I do not remember that. And if you had told me before I came down that you wanted to discuss this, I would have had all the dates and the times and the people. But you apparently did not

Excerpt from Exhibit S-40

want me to know that you were going to discuss this before we came down.

The Chairman. Wait a minute, Mr. Tobin. We apprised you of what we were going into. We could not go into all the details. That would be impossible.

Now, proceed with the questioning, Mr. Maletz.

Mr. Maletz. Now I take it that these investment banking concerns responded to your appeal by sending letters disapproving the Purcell plan on the ground that it would materially impair the port authority credit: is that correct?

Mr. Tobin. All except Blyth & Co.

Mr. Maletz. You remember Blyth & Co. refused; is that right?

Mr. Tobin. I remember that very well.

Mr. Maletz. Now I take it that these banking concerns have made a rather considerable profit over the years in underwriting port authority bond issues.

Mr. Tobin. No. They always complained that they get badly hooked on a port authority issue. As a matter of fact they are right now. We sold $25 million last Monday, and it is stuck, and they only sold $2 million of it. However, they are in business, and they are in business to make money, and I assume that they make enough on it so that they will bid on the next issue, as they bid on the one last Monday.

Mr. Maletz. Is it not true on June 17, 1959, a syndicate led by Halsey, Stuart; Glore, Forgan, and Drexel, were successful bidders for a $30 million port authority consolidated bond issue?

Mr. Goldstein. Are you reading again from a record?

Mr. Maletz. Do you recall that?

Mr. Tobin. In or about that period, yes. What I would recall the Halsey, Stuart syndicate, were the successful bidders on an issue of port authority bonds.

Excerpt from Exhibit S-40

Mr. Holtzman. On that point. This was in spite of their complaints about losing money on these transactions?

Mr. Tobin. These are market complaints. If we went down to the street again, you would hear, "Oh, my God, we are hooked on another port authority issue." And you and I both know they are still in business, and they will be back there bidding on the next port authority issue.

Mr. Maletz. Without revealing specific figures, are you familiar with the fact that this syndicate made a very substantial profit indeed on their June 17, 1959, bid?

Mr. Tobin. I do not know. It was a public bid that they submitted and we accepted. It is really—we never get the figures on what they do, or do not.

Mr. Maletz. You would assume they do make a profit?

Mr. Tobin. I certainly would.

Mr. Maletz. On the port authority securities.

Mr. Tobin. Or any securities—State of New York securities, city of New York securities, U.S. Government securities, or they couldn't stay in business.

Mr. Maletz. Yes, we understand that.

Mr. Tobin. You seem to be making a point of it.

Mr. Maletz. Well, these are the bankers that you appealed to for help, Mr. Tobin?

Mr. Tobin. I appealed to all of them for help—the investment market.

Mr. Maletz. Now, Blyth & Co. is one of your principal investment underwriters, is it not?

Mr. Tobin. Yes, it is.

Mr. Maletz. Is it or is it not a fact that at this meeting of March 1, at the First National City Bank, the representatives of Blyth & Co. advised you that they would not sign the suggested letter that you had sent disapproving the Purcell plan?

Excerpt from Exhibit S-40

Mr. Tobin. I do not remember whether it was at that meeting. I do not remember at this stage, subject to checking my files, that I prepared a suggested letter. I do remember at some stage in or about that time, Blyth & Co. said they would not submit such a letter, and I told them in unvarnished language what I thought of their sense of moral responsibilities to the people they had sold port authority bonds to.

Mr. Maletz. Now, Mr. Eugene——

Mr. Tobin. An opinion I still carry with respect to the particular individual in Blyth & Co. who made that decision.

Mr. Maletz. I see. And I take it that would be Mr. Mr. Reginald M. Schmidt?

Mr. Tobin. It certainly would.

Mr. Maletz. The vice president?

Mr. Tobin. Yes.

Mr. Maletz. Who was then head of the municipal financing department of Blyth?

Mr. Tobin. Yes. Since retired.

Mr. Maletz. Mr. Eugene Mintkeski, treasurer of the port authority, was formerly associated with Blyth & Co.

Mr. Tobin. Yes, we got him 12 or 15 years ago.

Mr. Maletz. As you previously testified, Mr. Schmidt was in March 1959 a vice president of Blyth & Co., and head of its municipal finance department.

Mr. Tobin. What is the date there?

Mr. Maletz. About March 1959.

Mr. Tobin. Yes, he was.

Mr. Maletz. Did you ask Mr. Mintkeski to call Reginald M. Schmidt at home or at any time to urge him to sign a letter disapproving the Purcell plan to the extent that it called for port authority financing?

Mr. Tobin. I have a recollection of asking Gene to call Reginald Schmidt about what I felt was the shocking conduct that he was recommending.

Excerpt from Exhibit S-40

Mr. Maletz. The shocking conduct was that he would not sign the letter that you had suggested disapproving——

Mr. Tobin. I do not remember—but some letter, such as all the other investment bankers were signing.

The Chairman. What other letter could it be?

Mr. Tobin. They all signed different letters. I have the letters. They were submitted to the Governor. They are published in our reports on rapid transit, in the investigations by the New Jersey Senate and Assembly—senate or assembly.

Mr. Maletz. Now, do you know whether Mr. Mintkeski called Mr. Schmidt?

Mr. Tobin. I do not remember. But if you had told me you wanted to get into this subject, I would have gone into all of this—the record of these.

Mr. Maletz. Do you remember that now?

Mr. Tobin. I remember that it was a negative response that he got.

Mr. Maletz. Did Mr. Mintkeski, according to your present recollection, report to you as to the nature of the conversations with Mr. Schmidt?

Mr. Tobin. I do not remember as I sit here. He most certainly did.

Mr. Maletz. Well, I take it——

Mr. Tobin. Whatever it was, he reported it to me.

Mr. Maletz. I take it Mr. Mintkeski, Mr. Chairman, is in this room. May I suggest——

The Chairman. Yes. Is Mr. Mintkeski here?

Mr. Mintkeski. Yes.

The Chairman. Would you step forward, Mr. Mintkeski, please.

Do you solemnly swear the testimony you will give is the truth, the whole truth, and nothing but the truth, so help you God?

Excerpt from Exhibit S-40

Mr. Mintkeski. I do. May I stand so I can hear you better and you can hear me better?

TESTIMONY OF EUGENE A. MINTKESKI, DEPUTY DIRECTOR OF FINANCE AND TREASURER, PORT OF NEW YORK AUTHORITY

Mr. Maletz. Would you state for the record your name and address?

Mr. Mintkeski. Eugene Mintkeski, 100 Rocky Wood Road, Manhasset, Long Island.

Mr. Maletz. Are you an officer of the port of New York?

Mr. Mintkeski. Yes, deputy director of finance and treasurer.

Mr. Maletz. How long have you been with the port authority?

Mr. Mintkeski. Since April 1948.

Mr. Maletz. And you previously have been associated with Blyth & Co?

Mr. Mintkeski. The previous 12 years.

Mr. Maletz. I see. Mr. Mintkeski, do you recall telephoning Mr. Reginald Schmidt of Blyth & Co. on the evening of March 1, 1959, and telling him that you were very much disturbed over the fact that Blyth & Co., would not sign a letter disapproving the Purcell plan?

Mr. Mintkeski. I may have, but I don't remember, sir, and I wouldn't tell him that; no, sir.

The Chairman. You have no recollection whatsoever of telephoning Mr. Schmidt?

Mr. Mintkeski. Not on that particular point, Mr. Chairman.

Mr. Maletz. All right, sir.

Mr. Holtzman. Do you remember any conversation with Mr. Tobin relative to this point—Mr. Schmidt, rather?

Mr. Mintkeski. Yes; I may have talked to Mr. Schmidt about this. After all, Mr. Schmidt was my former boss. I was very friendly with him.

Excerpt from Exhibit S-40

Mr. Maletz. Do you remember now calling him?

Mr. Mintkeski. No; I don't—not on this point.

The Chairman. Do you remember having a conversation with him, where you discussed this Purcell plan and asked him to write this disapproving letter?

Mr. Mintkeski. No; I have never asked him to do that at all, sir. He wasn't even at the meeting to which you refer.

Mr. Maletz. I have no further questions of you, Mr. Mintkeski, at this moment.

Mr. Tobin, on March 2 or thereabouts, did you send a 10-page letter to Mr. Purcell, expressing opposition to his plan for port authority railroad commuter financing?

Mr. Tobin. May I have the letter that you are talking about, please?

Mr. Maletz. Certainly. I would first ask you whether you recall sending him a letter.

Mr. Tobin. I sent him a number of letters. He sent me a number of letters.

The Chairman. This is for identification only?

Mr. Maletz. For identification only.

Do you recall that letter now, Mr. Tobin?

Mr. Tobin. Yes; I do.

Mr. Maletz. I see. May we have it back?

Do you recall, Mr. Tobin, that on March 3 or thereabouts, you and Mr. Howard Cullman went over to see Joseph Ripley, chairman of the board of Harriman Ripley, for the purpose of getting him to intercede with Mr. Reginald Schmidt of Blyth & Co., and have him write a letter disapproving the Purcell plan?

Mr. Tobin. I remember that—I don't remember that the date was March 3, but somewhere in around there—Mr. Howard Cullman and I went to see Mr. Joseph Ripley for the purposes you have indicated.

Mr. Maletz. Having him intercede with Mr. Schmidt?

Excerpt from Exhibit S-40

Mr. Tobin. Yes.

Mr. Maletz. Who is Howard Cullman?

Mr. Tobin. Howard Cullman has been a commissioner of the Port of New York Authority for 33 years. He was formerly its vice chairman for 10 years, and then its chairman for 10 years. He is now its honorary chairman.

Mr. Maletz. Why did you have Mr. Cullman go with you to visit Mr. Ripley?

Mr. Tobin. Why not?

Mr. Maletz. I am asking you why.

Mr. Tobin. Mr. Cullman is the chairman—was the chairman of the port authority.

Mr. Maletz. Was he the chairman at that time, in 1959?

Mr. Tobin. I don't——

The Chairman. Who was chairman in 1959?

Mr. Tobin. No. He was not chairman at that time. He was the honorary chairman at that time.

Mr. Maletz. Why did you get him to go with you?

Mr. Tobin. Mr. Howard Cullman goes with me on all sorts of port authority business, and has for the last 30 years. Why did you and the chairman go to see somebody on some proper purpose of this committee?

The Chairman. He was honorary chairman——

Mr. Tobin. But he is a commissioner, he is a full commissioner of the port authority.

The Chairman. At the present time, too? Was he full commissioner at that time?

Mr. Tobin. Yes. He still is.

The Chairman. And the chairman was some other person?

Mr. Tobin. The chairman at that time, my best recollection of it, was Mr. Donald Lowe, of New Jersey.

Mr. Maletz. Did Mr. Ripley tell you, and Mr. Cullman——

Excerpt from Exhibit S-40

Mr. Tobin. Mr. Chairman, that is the confusing thing. When you say honorary chairman, you assume a retirement. This was not so in this case at all. Howard Cullman was then, and is right today, a very active commissioner of the port authority. Well, you recall that. You have subpenaed him here.

The Chairman. What is that?

Mr. Tobin. You will recall that. You have subpenaed him here.

Mr. Maletz. Did Mr. Ripley tell you and Mr. Cullman that he would do all he could to get Blyth & Co. to go along with the port authority in disapproving the Purcell plan?

Mr. Tobin. That is my best recollection, that he did.

Mr. Maletz. To your knowledge, did Mr. Ripley, for that purpose, have lunch with Mr. Schmidt on that date to discuss his sending a letter disapproving the Purcell plan?

Mr. Tobin. I don't know.

Mr. Maletz. Do you recall on or about March 3, Mr. Tobin, that Mr. Schmidt of Blyth & Co. called you on the telephone?

Mr. Tobin. No; I don't remember the date. In that time Mr. Reginald Schmidt and I had some very brimstone conversations over the telephone.

Mr. Maletz. Some very heated conversations?

Mr. Tobin. Oh, yes.

Mr. Maletz. Did you, in the course of any conversation with Mr. Schmidt, demand that Blyth & Co. write a letter disapproving the Purcell plan?

Mr. Tobin. I have no recollection of that. I certainly was urging him to do so, and I was certainly expressing the most shocked views of his refusal to do so.

Mr. Maletz. Mr. Chairman, at this point I would read a memorandum dated March 4, 1959, prepared by Mr. R. M. Schmidt, who has been identified as vice president of Blyth & Co., and head of its municipal finance department.

Excerpt from Exhibit S-40

On Wednesday—

This is dated March 4, 1959—

On Wednesday, February 25, George Leib called me into his office and asked me to take a call from Mr. Robert W. Purcell. George advised me that Mr. Purcell is on the committee appointed by the Governor to study the railroad commuter and rapid transit problem in New York City.

Mr. Purcell stated that he was working on a plan that he thought would be constructive and wanted my opinion and reaction to it. In brief, it provided for the Port of New York Authority to finance the Long Island Rail Road and New York Central in purchasing all passenger equipment and take therefor their equipment bonds or notes. He thought that the port could do 100-percent financing and extend the payout for 20 to 25 years.

He also stated he read the letter which I had written to the port authority on July 16, 1958, in connection with the New Jersey legislative committee hearing on the subject but he thought that the approach he now suggested possibly eliminated some of the objections I had expressed in that letter. I told him I did not think I could give a quick answer to him as to the feasibility of his idea but it did seem to apear to be ingenious and something worthwhile exploring. We had further discussion regarding the security of the leases as desirable investment for the Port of New York Authority upon which to issue their own bonds.

Also, I stated I did not know whether or not they had the legal authority under the indenture but we agreed there was no point of discussing any further the legal aspects and also there was much room for exploration as to the quality and character of the security offered.

The next we heard about this conversation was that the authority on Friday, February 27, called our office and asked us to meet with them at the First National City Bank on Monday, Marc[illegible]. George LeVind and Fred Miller attended that meeting. Also, the managers of the syndicates

Excerpt from Exhibit S-40

that usually bid for their bonds at public sale: namely, Harriman Ripley & Co.—our joint account partners—and Halsey, Stuart; Glore, Forgan, and Drexel who are joint managers of the competing syndicate. They presented a strong story disapproving the plan and the adverse effect on their credit and market for their bonds; also submitted a suggested letter for the managers to sign. LeVind, Miller, and Hawes discussed their request and also talked with me at home. We all agreed not to sign the letter or send any letter.

Following this, Gene Mintkeski—Port of New York Authority—called me at home and talked with me for about 15 minutes. He apparently was very much disturbed over the fact that we would not sign such a letter and that I had told Mr. Purcell I thought his idea was ingenious, worth studying and exploring. I stated that at no time did I give approval or disapproval to Mr. Purcell's idea. We felt very strongly that we should have in greater detail Mr. Purcell's plan and at least give him an equal chance to present an answer to the position that the Port of New York Authority is taking.

On Tuesday, March 3, at 1 p.m., Joe Ripley of Harriman Ripley telephoned and asked me to go over there for lunch to discuss this Port of New York Authority problem. He had with him Elwood Smith, Stu Silloway and Berry. He stated the luncheon was prompted by Mr. Cullman coming to see him and considerably upset because he had heard that I had given approval to Mr. Purcell's plan and wanted to know whether or not I had.

The foregoing memorandum answers that. I told him specifically I had not given my approval but in response to a call to us I gave Mr. Purcell the courteous consideration that he was entitled to and reviewed the whole story as written above. They had no criticism of my action. In fact, Joe Ripley thought he would have acted in the same manner I had if he had had a call from a representative of Governor Rockefeller.

I reported all this to Messrs. Hawes and Miller and also in compliance with the request from Mr. Cullman

Excerpt from Exhibit S-40

(which was arranged by Mr. Ripley). I then called Austin Tobin. The conversation was very unpleasant. He, in fact, requested—if not demanded—that we write a letter disapproving the Purcell plan, which I told him we would not do and I took exception that they quoted me out of context in their letter of March 2, which he denied. The conversation was very acrimonious and I would say that Mr. Tobin was rude, officious and impertinent and I ended by telling him so.

R. M. SCHMIDT.

Then at the bottom:

I advised Purcell that the Port of New York Authority in their letter of March 2 quoted me out of context and without my permission.

Now, does this refresh your recollection, Mr. Tobin, of these events?

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Mr. Tobin. Yes.

Mr. Maletz. Would you say that Mr. Schmidt reported accurately on his telephone conversation with you?

Mr. Holtzman. Except, of course, with respect to the characterization of the witness.

Mr. Tobin. I think from his standpoint he was entitled to use that characterization. I was very strong in what I said to him. I talked to him about his moral and ethical responsibility to the people to whom he had sold bonds. I told him it was a hell of a thing for an investment banker to sell a client a bond and then walk out on him. And I—also he had said to me, which outraged me, that he was taking this position because he thought that Blyth & Co. ought not to get off on the wrong foot with the new administration. And I told him that was a lousy reason. So he was entitled to his characterization of what I said.

Excerpt from Exhibit S-40

The Chairman. Couldn't your attitude have been a hell of a thing to the commuters and the general public, too, conceivably?

Mr. Tobin. No, we are doing everything in our power, as was Mr. Purcell, and the State, for the commuters and the general public. I don't agree with that at all, Mr. Chairman.

Mr. Maletz. Mr. Chairman, at this point I would read another memo, from Harriman Ripley, dated March 5, 1959. This is a note to Mr. Ripley, signed "W.W."

Mr. Howard Cullman's secretary just telephoned the following message for you from Mr. Cullman:

"Governor Rockefeller was informed that issuing equipment trust to the railroads would not hurt port authority credit, and that all the investment bankers were unanimous that that was so. And, therefore, Mr. Cullman feels it is very important that Mr. Ripley send him the letter he requested."

I told her that the letter had been done in draft form yesterday afternoon but that you had to leave the office before it was completed, and that I felt sure the letter could be delivered to Mr. Cullman by hand today.

"We can send it to 161 Front Street," she said.

One further memorandum at this point, Mr. Chairman.

A memorandum from the files of Mr. Joseph P. Ripley, re New York Port Authority.

This is just to make a record of the fact that Howard Cullman and Austin Tobin came to see us at 12:30 today. Then we got Reg Schmidt to come over for lunch with S.F.S., E.D.S., H.J.B., and the writer.

Along about 3:45 p.m. Schmidt telephoned me to say that he had telephoned Tobin and that the conversation had ended up in a rather heated exchange of different views.

Excerpt from Exhibit S-40

Also, Schmidt says that Blyth are not going to write any letter on this subject.

Mr. Tobin, do you known Dwight Palmer?

• • •

Mr. Goldstein. Excuse me, if you are going to ask Mr. Tobin some questions with respect to those memos—I just merely wanted him to have copies.

Mr. Maletz. I think he has already been interrogated on this very point.

Mr. Tobin, do you know Dwight Palmer?

Mr Tobin. Very well.

Mr. Maletz. What is his title?

Mr. Tobin. He is the State highway commissioner of New Jersey, and in that department now he has also the division of rail transportation.

Mr. Maletz. Did you, on or about March 4, 1959, have an extensive conversation with Commissioner Palmer concerning the Purcell plan?

Mr. Tobin. Well, I don't know again about dates. I am in constant contact with Commissioner Palmer. Very few days go by that we are not in telephone communications with each other on a myriad of transportation problems in this area. In addition to that, Commissioner Palmer is Governor Meyner's designee as liaison with the port authority, and I am entitled to talk to Commissioner Palmer and keep him advised and understand that I am advising the Governor. He communicates rapidly with the Governor. We will have many conversations in which I tell him I think that the Governor's office ought to be advised of so-and-so, and he will either say he will take care of it, or he will call me back and say that the Governor says he agrees or he doesn't agree. And he frequently will call me and say that the Governor says so-and-so. So he occupies a position in the administrative affairs of New Jersey, and in

Excerpt from Exhibit S-40

its relationship with its agency, that is one in which—I am in daily contact with Commissioner Palmer, and certainly it would be my duty to keep Commissioner Palmer advised as to everything that was going on in the Purcell conversations.

And I take it for granted that I did. If I didn't, it would be a grievous fault.

Mr. Maletz: Do you recall a conversation on or about March 4, 1959—

Mr. Tobin. Of course not. You would have to refresh—

Mr. Maletz. Let me finish, please.

Do you recall a conversation on or about March 4, with Commissioner Palmer, in the course of which Commissioner Palmer advised you that Mr. Purcell and Governor Rockefeller considered commuter railroad financing to be the port authority's direct responsibility? Do you recall any such conversation?

Mr. Tobin. No; I don't recall that conversation.

Mr. Maletz. All right.

Mr. Tobin. There was always, in my conversations with Purcell and there are always questions of what is and is not the port authority's responsibility in the field of commuter rapid transit. That is a running discussion and debate in the press, and in official circles, in the boardroom of the port authority, and the Governors' offices, and with Mr. Purcell and Mr.—Commissioner Palmer and with Commissioner Wiprud of New York Commission. As a matter of fact, we were up at the Governor's office this last week discussing exactly this field.

The Chairman. I know you have lots of conversations with them.

Specifically did Commissioner Dwight Palmer of New Jersey tell you in the course of any conversation that Mr. Purcell said that both he and Governor Rockefeller con-

Excerpt from Exhibit S-40

sidered commuter railroad financing to be the port authority's direct responsibility?

Mr. Tobin. Well, that was—well, the word "direct," Mr. Chairman, without quarreling with it—but there were these conversations in which the Governor and Mr. Purcell were saying the port authority has a responsibility in this matter. And they knew I was advising Dwight Palmer, and he advising me back and forth as to what the progress of these conversations were.

Mr. Maletz. Do you recall, Mr. Tobin, writing a confidential memorandum to the file, dated March 5, 1959, entitled "Commuter Railroad Discussions, Proposal of Robert W. Purcell for Equipment Trust Financing"?

Mr. Tobin. No; I don't recall it. You would have to show me the memorandum.

Mr. Maletz. I will show you the memorandum, just for identification.

Mr. Goldstein. Mr. Maletz, this appears to be a memorandum of Mr. Tobin's. May I ask how you obtained that?

Mr. Maletz. Mr. Chairman, the counsel for the port authority has just raised a question.

Mr. Goldstein. I asked that, Mr. Maletz, for the reason that Mr. Tobin would have an ethical problem about discussing conversations with the Governor.

The Chairman. He would have what? Repeat that.

Mr. Goldstein. Ethical problem.

Mr. Maletz. Mr. Chairman, this is not a conversation with the Governor.

The Chairman: This is a conversation with Commissioner Palmer of New Jersey.

Mr. Goldstein. Well, he is the Govenor's representative.

Mr. Holtzman. He is not the Governor, though, is he?

Mr. Goldstein. No, sir.

Excerpt from Exhibit S-40

Mr. Maletz. Mr. Chairman, I might say this, if I may. This memorandum was obtained from a source which I personally do not think should be stated.

The Chairman. Do you identify the memorandum?

Mr. Tobin. Not yet. My files are loaded with thousands of memorandums, and I must read this. I don't refer to them again. This is some memorandum I may have written March 5, 1959, which I have not seen since.

The Chairman. All right, you may read it.

While Mr. Tobin is reading this letter, Mr. Mintkeski, will you come back to the stand, please?

Mr. Mintkeski. Yes, sir.

Mr. Maletz. Mr. Mintkeski, did you hear the memorandum I had read, prepared by Mr. Reginald M. Schmidt?

Mr. Mintkeski. About my conversation with him?

Mr. Maletz. Yes.

Mr. Mintkeski. Yes, sir.

Mr. Maletz. Does that refresh your recollection?

Mr. Mintkeski. No; I don't remember having a conversation with Mr. Schmidt about that particular problem.

The Chairman. Would you say that Mr. Schmidt is not telling the truth when he makes this statement?

Mr. Mintkeski. Oh, no; I have every confidence he is stating the truth, sir.

The Chairman. Then you believe what he says is true?

Mr. Mintkeski. I may have had a conversation with him, Mr. Chairman, but I don't recall it.

The Chairman. All right.

Have you identified the document now, Mr. Tobin?

Mr. Tobin. No; Mr. Chairman. This is a three-page memorandum full of all sorts of things, and I want to consider it.

The Chairman. I am going to order counsel to state where he got that memorandum from.

Excerpt from Exhibit S-40

Mr. Maletz. Mr. Chairman, the memorandum was obtained from the files of Blyth & Co., which turned over various documents concerning its relationship with the port authority in reponse to the subcommittee's request therefor. I believe, Mr. Chairman, too, that a subpena calling for production of such documents was served on Blyth & Co.

The Chairman. I just asked you to identify it, Mr. Tobin. Have you been able to identify it?

Mr. Tobin. I have only got about a half page to go, Mr. Chairman, and then I will.

Mr. Maletz. Do you recall the memorandum now, Mr. Tobin?

Mr. Tobin. Yes; I do; very well.

Mr. Maletz. You wrote the memorandum?

Mr. Tobin. I did.

Mr. Maletz. I see.

Mr. Chairman, with your permission, I would read this memo.

Would you prefer to read it, Mr. Tobin?

Mr. Tobin. No.

The Chairman. You read it.

Mr. Maletz. This is confidential to file from Austin J. Tobin, executive director, dated Thursday, March 5, 1959, subject "Commuter Railroad Discussions—Proposal of Robert W. Purcell for Equipment Trust Financing."

Commissioner Dwight Palmer had advised me by telephone yesterday morning (March 4) that he had just received a call from Mr. Robert W. Purcell, who is coordinating Governor Rockefeller's study of commuter transportation, in which Mr. Purcell advised him that he (Purcell) and Governor Rockefeller, were making excellent headway in formulating their plan for the commuter rapid transit problem in New York. That part of this plan was to be the financing of necessary commuter railroad cars and other

Excerpt from Exhibit S-40

equipment by the port authority on some basis similar to equipment trust financing. Mr. Purcell said that they believed they ought to have a bistate statute authorizing and directing the commissioners of the port authority to handle such financing and that he would like to work out a draft of such a statute with Commissioner Palmer. Mr. Purcell had specifically mentioned the Long Island Rail Road and Commissioner Palmer asked him why the Pennsylvania, who owned 100 percent of the Long Island, would not undertake such financing. Mr. Purcell replied that the Pennsylvania is unwilling to do so and that there was also a question as to whether or not their credit would be sufficient to undertake it.

Mr. Purcell also urged that Commissioner Palmer might be interested in having the port authority undertake the same type of financing for the necessary Hudson & Manhattan equipment but Commissioner Palmer replied that he would certainly not advise the State of New Jersey to involve itself in some $50 million of equipment and rehabilitation financing for the Hudson & Manhattan and he therefore had serious question as to whether he wanted to pressure an agency of the State of New Jersey, such as the port authority, to get into such a proposal. Commissioner Palmer said that no one could be sure as to the proper function of the Hudson & Manhattan Railroad in the commuter picture say 5 years from now in the light of changes in the transportation pattern that were obviously ahead, particularly in New Jersey.

Mr. Purcell said that it was Governor Rockefeller's wish that Commissioner Palmer take this matter up with Governor Meyner and Commissioner Palmer agreed to do this and to advise Mr. Purcell of the Governor's views.

Commissioner Palmer then wrote a memorandum to Governor Meyner, including a recommendation that they refuse to support such a statute on the ground that any such financing program could prove very dangerous to the continued good credit of the port authority and its ability to continue to go forward with port projects which affected New Jersey as well as the whole port district. Further-

Excerpt from Exhibit S-40

more, Commissioner Palmer expressed the view that any attempt to pressure the commissioners of the port authority in a matter that affected their binding commitments to bondholders and their pledge to bondholders not to go forward with any projects that would adversely affect the credit of the port authority was dishonorable and was certain to be self-defeating. Commissioner Palmer also sent Governor Meyner a copy of our letter to Mr. Purcell of March 2.

This morning [March 5] Governor Meyner advised Commissioner Palmer that he had read both his memorandum and the port authority's letter to Mr. Purcell of March 2, that he fully agreed with them, and that he considered Mr. Purcell's proposal "ridiculous."

Commissioner Palmer advised me at 11:30 a.m. this morning that he had just finished a long telephone call to Mr. Purcell who had also put his associate Mr. Golub (also counsel to Herman Stichman, trustee of the Hudson & Manhattan), on the phone. He told Mr. Purcell that both Governor Meyner and he had reviewed his proposal and that they could not go along with it and that frankly they would not consider such legislation to be an honorable course. Commissioner Palmer says that during the course of the conversation he repeated this several times to Mr. Purcell.

Mr. Purcell asked if Commissioner Palmer realized that this meant that Mr. Purcell would have to tell Governor Rockefeller that New Jersey definitely refused to go along in Mr. Purcell's effort to obtain port authority financing of this railroad equipment and Commissioner Palmer replied that although he hadn't stated it just that way that that was the substance of Governor Meyner's and his own position.

Mr. Purcell argued that he regarded his proposal certainly as the least onerous of any suggestions that had been advanced for port authority participation in the commuter railroad problem. And Mr. Purcell said that both he and Governor Rockefeller considered commuter railroad financing to be the port authority's direct responsibility.

Commissioner Palmer advises me that at this point Mr. Purcell turned directly to repeated threats as to Governor

Excerpt from Exhibit S-40

Rockefeller's future attitude toward bistate cooperation, with particular reference to the port authority. He said specifically that "the next time New Jersey asks us to do something involving the port authority, we won't do it." Commissioner Palmer replied that he had much more faith in Governor Rockefeller than to accept Mr. Purcell's threat at face value. That he had confidence that Governor Rockefeller was a broadminded person who would not reject a port authority proposal, even though that proposal was supported by New Jersey, provided that Governor Rockefeller thought that it was a good project. Commissioner Palmer says that despite this effort at placating Mr. Purcell that Mr. Purcell kept returning to these threats of future retaliation by the State of New York against the State of New Jersey. He said "I hope you realize that you are closing the door for the future on anything New Jersey wishes to do through the port authority that involves the cooperation of New York."

Mr. Purcell also suggested that from the nature of some of the bills that were pending in the New Jersey Legislature in support of port authority participation in the operation of commuter transit service, he would question whether or not Governor Meyner's position on port authority financing of the rehabilitation and reequipment of these railroads would find support in the New Jersey Legislature.

Commissioner Palmer made notes of his own throughout this amazing conversation and he advises me that he will send me a copy.

Austin J. Tobin, *Executive Director.*

In other words, does this refresh your recollection, Mr. Tobin, that you were advised by Commissioner Dwight Palmer, that according to Mr. Purcell, both he, Purcell, and Governor Rockefeller considered commuter railroad financing to be the port authority's direct responsibility?

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Excerpt from Exhibit S-40

Mr. Tobin. It refreshes my recollection as to everything in that memorandum.

Mr. Maletz. Including that particular point?

Mr. Tobin. Including that.

Mr. Maletz. And to rephrase the question, does this refresh your recollection that Commissioner Dwight Palmer of New Jersey told you, in the course of this conversation, that Mr. Purcell said that both he and Governor Rockefeller considered commuter railroad financing to be the port authority's direct responsibility?

Mr. Tobin. That Purcell said that to Commissioner Palmer?

Mr. Maletz. Yes.

Mr. Tobin. That refreshes my recollection of that.

Mr. Maletz. Did Commissioner Palmer tell you, or does this refresh your recollection, that Commissioner Palmer told you that Purcell had advised him that both he, Purcell, and Governor Rockefeller were making excellent headway in formulating a plan for the commuter rapid-transit problem in New York, which would require port authority financing?

Mr. Tobin. Yes.

Mr. Maletz. And does this refresh your recollection that Commissioner Palmer advised you that Mr. Purcell stated that both he and Governor Rockefeller believed they ought to have a bistate statute directing the port authority to handle such financing?

Mr. Tobin. Yes; they both changed their minds, as you know, from the Purcell report.

Mr. Maletz. Well, talking about the situation as of March 5, 1959; that is clear, is it not?

Mr. Tobin. The memorandum is perfectly clear.

I think it an outrageous impropriety to the two Governors for you to have introduced such a memorandum, and

Excerpt from Exhibit S-40

I think nothing could more demonstrate the position we are taking here, and will—the State will—take in the case in court.

The Chairman. That may be your opinion. You were not asked a question in that regard, and we suggest that if you want to make a statement, you ask the Chair whether you have the privilege to do so. That is under the rules of the House of Representatives. You cannot make gratuitous remarks of that sort, Mr. Tobin. We think it is a proper question.

Mr. Maletz. Mr. Tobin, is Joseph A. Martino one of the New York commissioners of the Port of New York Authority?

Mr. Tobin. Yes; he is.

Mr. Maletz. And according to your annual report, Commissioner Martino was the president of the National Lead Co. and a director of the Chase Manhattan Bank; is that correct?

Mr. Tobin. That is correct.

Mr. Maletz. And according to your present recollection, was he appointed to the port authority board of commissioners in 1958 by former Governor Harriman, for an interim term, and then reappointed by Governor Rockefeller in January 1959?

Mr. Tobin. He was.

Mr. Maletz. Now, after your telephone conversation with Commissioner Dwight Palmer, did you ask Commissioner Martino to intercede directly with Governor Rockefeller in order to prevent from being adopted the Purcell plan calling for port authority financing of railroad commuter cars?

Mr. Tobin. Commissioner Martino is a commissioner of the port authority. I talked to him about it, and all other commissioners about it. And they did talk to Governor Rockefeller about it.

Excerpt from Exhibit S-40

Mr. Maletz. Did Mr. Martino advise you he would take this matter up directly with Governor Rockefeller?

Mr. Tobin. He did, and did take it up directly with him.

Mr. Maletz. Do you recall he was in Palm Beach, Fla., at the time?

Mr. Tobin. Yes; I do.

Mr. Maletz. And do you recall that from Palm Beach Commissioner Martino called Governor Rockefeller, who was then in Albany, called Governor Rockefeller twice, to urge him to disapprove the Purcell plan?

Mr. Tobin. I know that he communicated with Governor Rockefeller. He told me he did.

Mr. Maletz. Do you remember any more specific details, Mr. Tobin? Did you report this matter to the board of commissioners?

Mr. Tobin. What matter?

Mr. Maletz. About Commissioner Martino's telephone discussions with Governor Rockefeller?

Mr. Tobin. Everything we have discussed this morning was reported to the commissioners completely and continuously, and contemporaneously, and including their own actions and activities in the matter.

Mr. Maletz. Did you report to the commissioners specifically that Commissioner Martino, who was then in Palm Beach, called Governor Rockefeller twice about this matter?

Mr. Tobin. I do not remember.

Mr. Maletz. I show you for identification—

Mr. Tobin. I assume I did.

Mr. Maletz. A letter dated March 6, 1959.

Mr. Tobin. This is a letter to all of the commissioners of the port authority, including Commissioner Martino.

Mr. Maletz. I asked Mr. Tobin, if you would just identify the letter.

Excerpt from Exhibit S-40

Mr. Tobin. May I read it? Mr. Maletz, what bothers me about this is that—

Mr. Maletz. Did you write the letter, Mr. Tobin?

Mr. Tobin. Oh, yes. Is that this appears to be—

The Chairman. Let us have the letter back, please.

Mr. Tobin. At a date when the plan had been worked out and agreed upon.

The Chairman. Wait until a question is asked, Mr. Tobin. You will get an opportunity to respond in your own way.

Mr. Maletz. Do you recall having written this letter, Mr. Tobin?

Mr. Tobin. Yes, I did.

Mr. Maletz. That is your signature?

Mr. Tobin. Yes.

Mr. Maletz. Mr. Chairman, I would read the letter at this point. This is a letter dated March 6, 1959, to the various commissioners by Mr. Tobin:

MY DEAR COMMISSIONER: Commissioner Martino has had two telephone conversations with Governor Rockefeller about the proposals of Mr. Robert W. Purcell (who is acting as the Governor's transportation consultant), that the port authority should attempt to finance commuter railroad rolling stock and the rehabilitation of other commuter railroad equipment through some arrangement in the nature of what Mr. Purcell refers to as equipment trust financing. These telephone conversations took place on Wednesday evening, March 4, and Thursday morning, March 5, between Commissioner Martino's winter home in Palm Beach and the Governor's office in Albany.

Toward the conclusion of Thursday morning's discussion Commissioner Martino suggested the Governor might like to meet with the commissioners.

At yesterday's meetings of the finance, port planning and operations committees, at which the chairman, the honorary chairman, and Commissioners Colt, Hamilton, Kellogg,

Excerpt from Exhibit S-40

and Clancy were present, it was tentatively decided, subject to the convenience of the rest of the board, that the most convenient day and time for this preliminary meeting would be on the same day (Sunday, March 15) at 10 a.m. at one of the hotels in central Manhattan near the Governor's apartment.

This coming Thursday, March 12, is the date for the March meeting of the board. However, four of the New York commissioners will be out of town on Thursday so that we would not have a quorum and therefore cannot hold a board meeting. I suggest, therefore, that we hold the regular Thursday meeting of the board simultaneously with the 10 a.m. Sunday morning meeting to be held in connection with our preparation for the Governor's luncheon.

We will prepare a summary of Mr. Purcell's equipment-trust proposal and an agenda of such other port authority items as may come up for discussion during the course of the meeting with the Governor.

We have reserved suite 2111 for this purpose at the Hotel Savoy-Hilton (formerly the Savoy-Plaza) which is located on Fifth Avenue at the corner of 59th Street.

Arrangements for your convenient transportation to and from these Sunday meetings will be made through your office.

Sincerely,

Austin J. Tobin,
Executive Director.

Was that an accurate report to the commissioners?

• • •

Mr. Tobin. My letter to the commissioners?

Mr. Maletz. The letter I just read.

Mr. Tobin. I do not understand what you mean.

Mr. Maletz. Was this letter an accurate report to the commissioners?

Mr. Tobin. That letter simply calls—it sets dates for meetings?

Excerpt from Exhibit S-40

Mr. Maletz. Yes. Was the meeting held between Governor Rockefeller and the port authority commissioners at the Savoy-Hilton?

Mr. Tobin. No, it was not. That was a meeting before the meeting with the Governor. Then there was a meeting after that at the Governor's apartment.

The Chairman. Mr. Tobin, will you not—please answer questions, and then you can amplify them.

Mr. Tobin. I am answering them. I am answering them directly, sir.

The Chairman. Was such a meeting held?

Mr. Maletz. At the Savoy-Hilton on Sunday.

Mr. Tobin. Mr. Maletz asked me, was a meeting held with Governor Rockefeller at the Savoy-Hilton, and it was not.

The Chairman. Was there any meeting held at the Savoy-Hilton?

Mr. Tobin. Yes, with the commissioners of the port authority as called in that letter.

The Chairman. Who was present?

Mr. Tobin. I do not remember. But the most I would say, Mr. Chairman, my recollection is that practically all the commissioners of the port authority were there. We have minutes of those meetings, and you have the minutes of those meetings, so you know who was there.

The Chairman. Was anybody representing the Governor present?

Mr. Tobin. Not at that meeting. We went from there across to the Governor's apartment.

The Chairman. And you met with the Governor at the Governor's apartment?

Mr. Tobin. We had lunch with the Governor at the Governor's apartment.

Mr. Maletz. That was Sunday, March 15?

Excerpt from Exhibit S-40

Mr. Tobin. If that is what the letter says, yes, that is when it was.

Mr. Maletz. Now, at that particular meeting at the Governor's apartment, was Mr. Purcell's proposal for port authority financing of a rail commuter program, was that proposal dropped?

Mr. Tobin. I may say that I think it is very improper of you to inquire what went on in the meeting with Governor Rockefeller and the commissioners of the port authority.

Mr. Maletz. Was the proposal dropped?

Mr. Holtzman. This is the meeting at the hotel.

Mr. Tobin. The Governor was not there, sir.

The Chairman. At the meeting at the Governor's luncheon, was the final conclusion to the effect that the Purcell plan be dropped and discarded? You can answer, and I will ask the question, if you wish to reply, what prompted that conclusion. Now, is your answer "Yes" or "No"?

Mr. Tobin. At that time the proposals that we were talking about before, that had been discussed with the investment bond dealers, had been dropped. It had been dropped for quite some time. The discussions that we had at that meeting were discussions about the proposal as it stood then, which was the proposal that is enacted into law, and is the law of the State now.

Mr. Maletz. When were suggestions made by Mr. Purcell for financial assistance by the port authority in the field of commuter rapid transit dropped?

Mr. Tobin. Somewhere in between the events that you were talking about an hour ago, and somewhere—and this period of this letter, because at the period of this letter, they didn't exist any more, and at the period of this letter, as I recall it, Mr. Purcell had submitted his report, and his report contained the recommendation, which was sub-

Excerpt from Exhibit S-40

sequently enacted into law by the States of New York and New Jersey.

Mr. Maletz. Instead of the Purcell plan, is it not correct, the State of New York, under bistate legislative authorization, sponsored by the port authority——

The Chairman. Fix the dates.

Mr. Maletz. Let me ask you this question, Mr. Tobin.

According to your letter of March 6, Mr. Tobin, to the commissioners, Mr. Martino had two conversations with Governor Rockefeller, one on March 4 and one on March 5.

Was the Purcell proposal for port authority financing of railroad commuter cars dropped after those conversations?

Mr. Tobin. No. That proposal—my recollection is that that proposal was dropped considerably before that time.

Mr. Maletz. Well, let us see your letter again. Your letter says that—

> Commissioner Martino has had two telephone conversations with Governor Rockefeller about the proposals of Mr. Robert W. Purcell • • • that the port authority should attempt to finance commuter railroad rolling stock and the rehabilitation of other commuter railroad equipment through some arrangement in the nature of what Mr. Purcell refers to as "equipment trust financing."

Mr. Holtzman. May we have the date of that letter.

Mr. Maletz. Wednesday evening, March 4, and Thursday, March 5, were the dates of the phone calls.

My question is this: When, if you know, was Mr. Purcell's proposal for port authority financing dropped?

Mr. Tobin. I do not know when Mr. Purcell changed his mind on it.

Mr. Maletz. It was dropped, was it not, after Mr. Martino's telephone conversations?

Excerpt from Exhibit S-40

Mr. Tobin. I do not remember just what time is was.

I do know at the occasion of the port authority meeting that you referred to, the discussion was entirely about the proposal that was enacted into law.

Mr. Maletz. I am going to ask you about that now, if I may.

Mr. Holtzman. Just one question there. If that is so, Mr. Tobin, what was your intention in referring to these two conversations, if in fact the plan had already been abandoned?

Mr. Tobin. My recollection—and I want to say to you, Congressman, that it is a bit narrative—that the arrangement, and I think that becomes clear from the letter, too, for the meeting with the Governor, and the luncheon with the Governor, and whether he would be in New York over the weekend, that those were made by Commissioner Martino. Those arrangements were made. In other words, I did not say in that letter I have a call from Bob Purcell, or I have had a call from Governor Rockefeller, and the Governor wants to have lunch with us on Sunday, and therefore I suggest we have a meeting ahead of that time.

I say that Commissioner Martino had been in touch with him, and as a result of that, we are going to meet.

Mr. Maltez. Mr. Tobin, may I direct your attention again to a letter which you wrote to Mr. Ripley, dated March 17, 1959. This is a letter to Mr. Ripley:

> In the light of our discussion in your office on March 5 about commuter rapid transit and the port authority, I thought you would like to have the full transcript of our newspaper release.
>
> In the course of my discussions with Governor Rockefeller and Mr. Purcell subsequent to March 5 the proposal for port authority participation on the basis of what

Excerpt from Exhibit S-40

was called "equipment trust financing" or, for that matter, suggestions for any financial assistance by the port authority in the field of commuter rapid transit were dropped. We were then able to come to this combination of State advances and bonds guaranteed by the State, with the port authority simply carrying out the administrative and managerial work of the State's participation.

Thank you very much again for your letter of March 5. We were, as you know, shocked by Blyth & Co.'s refusal in this crisis to stand by the customers to whom they had sold port authority securities through the years. On the other hand, the Commissioners were absolutely certain that such an attitude would be at the ends of the earth from your sense of investment responsibility. And this prompted our immediate and direct appeal for your help—which, as on so many other occasions throughout the creation and development of the authority, was immediately forthcoming.

• • •

Mr. Tobin. What is the date of that again, Mr. Maletz?

Mr. Maletz. March 17. So on the basis of your letter of March 17, Mr. Purcell's plan was dropped after March 5; is that not correct?

Mr. Tobin. I do not remember what dates it was dropped.

Mr. Maletz. Is that not what your letter says?

Mr. Tobin. It was dropped sometime before March 17.

Mr. Meader. Mr. Chairman.

Mr. Tobin, I have your letter of March 6, which has been read, and the impression I get from that letter is that the purpose of this meeting on Sunday morning, before the Governor's luncheon, and the purpose of the meeting at the Governor's luncheon, was to discuss the Purcell equipment trust proposal, because your letter, the third paragraph from the end, says this:

We will prepare a summary of Mr. Purcell's equipment-trust proposal and an agenda of such other port authority items as may come up for discussion during the course of the meeting with the Governor.

Excerpt from Exhibit S-40

Would it not be a fair inference that Mr. Purcell's plan was dropped on the 15th at the luncheon you had with Governor Rockefeller?

Mr. Tobin. It would, Mr. Meader, but I do not remember it that way. That is my point. If you told me you wanted to go into this, I would have refreshed my recollection on it. But I do not remember it that way. My recollection is of a luncheon conference with Governor Rockefeller, Mr. Purcell, myself, Mr. Goldstein, at which we discussed only the plan which was encompassed in the Purcell report, and was enacted into law.

Now, that is the best of my recollection at this time.

Mr. Meader. And that the equipment trust idea had been dropped before you ever had the meeting?

Mr. Tobin. Had been dropped. But these things were happening within days and in shifts. And as you call me in here to be suddenly confronted by this, it is almost as if Mr. Maletz was concerned that I might remember some of these things. They happened fast.

Mr. Meader. Now, just a minute. Mr. Chairman, I think it comes with poor grace for Mr. Tobin to complain about surprise when he has refused access to the records of the port authority itself in which case he would have had full and complete information on everything which the committee had. But because of the obstruction, the committee has had to go to other sources and obtain these documents from the files of people that did business with the port authority. And it seems to me it comes with very poor grace to complain of surprise when it would have been very easy and simple to cooperate with the committee and let them have access to the files, in which case they would have been completely apprised of what the committee had in its possession.

The Chairman. I want to supplement what you say. The recalcitrance of the port authority officials, particularly in refusing to let us see their records, forced us to go to extremes involving considerable expense, involving infinite patience, involving the employment of governmental agencies, including the General Accounting Office, to aid our staff and counsel in endeavoring to ferret out matters which could very easily have been obtained if we had these records that we asked the port authority to submit.

I agree with you, it comes with ill grace for Mr. Tobin to take this kind of stand.

Mr. Maletz. Mr. Tobin, instead of the Purcell plan, is it not correct that the State of New York, under bistate legislative authorization, sponsored by the port authority, appropriated $20 million to the port authority to be used in purchasing commuter railroad cars for the purposes of renting them to commuter railroads operating them in municipalities in the State of New York?

Mr. Tobin. That is correct.

Mr. Maletz. And is it not correct that under this program—

Mr. Tobin. That was the Purcell plan.

Mr. Maletz. The Purcell plan called for port authority financing, did it not?

Mr. Tobin. No. The Purcell plan is in his printed report, and is a State document of the States of New York and New Jersey.

Mr. Maletz. I am talking about Mr. Purcell's original proposal.

Mr. Tobin. Those were his original discussions and proposals. That is not where he came out.

Mr. Goldstein. Mr. Maletz, what Mr. Tobin means is that the official Purcell plan on file with the Legislatures

of the State of New York and New Jersey called for the legislation.

Mr. Maletz. I am talking about the original proposal which your letter indicates was dropped subsequent to March 5—his original proposal called for port authority financing, did it not?

Mr. Tobin. Yes, sir. That was dropped. By Mr. Purcell.

Mr. Maletz. Subsequent to—

Mr. Tobin. By Governor Rockefeller.

Mr. Maletz. Subsequent to Mr. Martino's discussions, is that not right?

Mr. Tobin. I am not sure whether it was subsequent to that or not.

Mr. Maletz. Is that not what your letter says?

Mr. Tobin. No, it does not say that. It says that on those dates Commissioner Martino discussed that issue with Governor Rockefeller.

The Chairman. The letters speak for themselves, and the members of the committee will evaluate those letters in their own way.

Mr. Maletz. In order to get this in context, Mr. Chairman, may I repeat the last question to Mr. Tobin.

Instead of the original Purcell proposal, is it not correct that the State of New York under the bistate legislative authorization sponsored by the port authority appropriated $20 million to the port authority to be used in purchasing commuter railroad cars for the purpose of renting them to commuter railroads operating in municipalities in the State of New York?

Mr. Tobin. Under the official Purcell plan, that is what was done.

Excerpt from Exhibit S-40

Mr. Maletz. And is it not correct that under this program, the port authority is simply carrying out the administrative and managerial work of the State's participation?

Mr. Tobin. That is quite correct.

Mr. Maletz. Is it not correct that this bistate legislation prohibits the port authority from borrowing any money for the purchase of such cars unless and until New York State shall have guaranteed the payment of principal and interest thereon?

Mr. Tobin. That is correct.

Mr. Maletz. Does this legislation prohibit the port authority from pledging its full faith and credit or from pledging or using for this railroad car program any of its revenues and reserves pledged in support of consolidated bonds including the revenues of any of its existing facilities or any of its existing reserves?

Mr. Tobin. Yes; that is right.

Mr. Maletz. Is it correct that the port authority, even after it is authorized to issue bonds guaranteed by New York State, is authorized to pledge only the railroad cars purchased, the rentals therefrom, and the State's liabilities and its guarantees?

Mr. Goldstein. That is part of the statute, Mr. Maletz. If we are to accept——

Mr. Maletz. I am quoting directly from the bond indenture.

Mr. Goldstein. If it is a direct quote from the bond indenture, then the answer is yes.

Mr. Maletz. Is the answer to the question "Yes"?

Mr. Goldstein. If it is a direct quote.

The Chairman. Yes; it is.

Mr. Maletz. Is an amendment to the New York State constitution necessary to have a guarantee by the State of New York?

Excerpt from Exhibit S-40

Mr. Tobin. That is my understanding; Mr. Goldstein so advises me.

Mr. Maletz. Must such constitutional amendment be adopted by two successive legislatures and thereafter approved by a majority of the people in a popular referendum?

Mr. Tobin. Yes.

Mr. Maletz. The legislation by which the State of New York adopted the $20 million rail commuter car proposal has been effective since September 1959. How many new railroad commuter cars have been provided by the Port Authority up to this point under this legislation?

Mr. Tobin. None.

Mr. Maletz. Mr. Chairman, at this point I would offer the documents referred to dealing with the railroad commuter car problem for the record.

• • •

Mr. Tobin. I may say those negotiations on those are in very, very active daily progress, and there are certain reports as to that progress in the hands of the Governor, and the Governor will choose when, I assume, he wishes to make an announcement of what has been accomplished to date under this program. But he has not made that announcement as yet.

Mr. Holtzman. Has the port authority completed its own efforts in connection with this Purcell law?

Mr. Tobin. Mr. Holtzman, I could not say we have completed, because we are working on it every day, and certain phases have been completed, and certain others have not been completed. The New Haven Railroad is very close to bankruptcy.

Mr. Holtzman. I am trying to understand whether there is anything left for you to do, or whether it is all in the hands of the Governor.

Excerpt from Exhibit S-40

Mr. Tobin. No. There is lots for us to do. I meant there are certain reports on progress and status that were in the hands of the Governor, and that the Governor has the proper right to decide what he will do about them.

Mr. Maletz. Now, Mr. Tobin, I believe you previously testified that in March 1959 you appealed for the help of various invstment bankers who underwrite port authority bond issues in connection with Mr. Purcell's plan for the railroad commuter program.

In July of 1960, did you again appeal to these investment bankers for help in connection with this committee's investigation into the activities and operations of the port authority?

Mr. Tobin. At some stage I certainly did.

Mr. Maletz. Did you in or about July 1960 meet with officials of a number of these investment bankers?

Mr. Tobin. I believe so; yes.

Mr. Maletz. Do you recall that meeting?

Mr. Tobin. I recall such a meeting; yes.

Mr. Maletz. Where was that meeting held?

Mr. Tobin. National City Bank.

Mr. Maletz. Was it held on July 14, 1960?

Mr. Tobin. I don't know.

Mr. Maletz. Do you recall who was present?

Mr. Tobin. Generally and vaguely. The representatives of the various investment houses on the street.

Mr. Maletz. Was Harriman, Ripley; Drexel——

Mr. Tobin. Whatever the meeting was. There were 30 people there.

Mr. Maletz. I see. And you called this meeting to appeal to the investment bankers for help in connection with this committee's investigation?

Mr. Tobin. Yes; I called it to call to their attention the fact that that the assertions of power of this committee

Excerpt from Exhibit S-40

posed the gravest worry and concern to the whole tax-exempt municipal market, because if the assertions of power of this committee were correct, then one of the firm bases of the immunity of exemption of State and municipal bonds had been undermined, and I called their attention to the fact that in the *Shamberg* case, the whole argument of Government's counsel had been exactly the same argument that is offered here—that is, that the port authority is a Federal agency, and that the Government argued in the *Shamberg* case that being a Federal agency, it was not within the protection of the tax-exempt statute on municipal bonds which says municipal bonds, which says a State or municipal agency, State agency, or political subdivision.

And I told them that I thought very much the same questions were involved in your assertion that the port authority is a Federal agency subject to Federal control, Federal sovereignty, review, and consent to all its actions.

Mr. Maletz. Did you appeal to the investment bankers for help in stopping this committee's investigation into the activities and operations of the port authority?

Mr. Tobin. I appealed to them in calling this to the attention of State and municipal agencies throughout the country, and the people for whom they sell the bonds. Because I felt and still feel it was a matter of the most grievous concern to them.

Mr. Maletz. Did you appeal for their help in stopping this investigation?

Mr. Tobin. I said to them that this investigation, in my opinion, constituted a great threat to State and municipal financing. And this is your conclusion. You may take whichever conclusion you wish.

The Chairman. Wait a minute. Just answer yes or no. Did you appeal to these investment bankers or ask them to stop the activities of this committee?

Excerpt from Exhibit S-40

Mr. Tobin. I appealed to them that your activities were a grievous threat to State and municipal financing.

The Chairman. Did you ask them to, in turn, endeavor to stop the activities of this committee? You can answer yes or no.

Mr. Tobin. No; not in those words, no.

Mr. Holtzman. In any words.

The Chairman. What words did you use?

Mr. Tobin. The words that I am using now; that the activities, that your activities were a grievous threat to the future of State and municipal financing and its tax-exempt status.

Mr. Maletz. Mr. Tobin, at that meeting did you tell those present to get busy and have Congress stop this committee from putting the heat on the port authority?

Mr. Tobin. I made a long talk to that committee.

Mr. Maletz. Did you make some remarks similar to that?

Mr. Tobin. I do not recall remarks similar to that.

The Chairman. Mr. Tobin, we have a memorandum here.

Mr. Maletz. Did you tell those present——

Mr. Tobin. The expression, "put the heat on," is not one of my expressions.

Mr. Maletz. Did you tell those present that unless this committee was stopped, the port authority would be in an intolerable position?

Mr. Tobin. I think we are in an intolerable position right now. I would use the word "intolerable"; yes. I think this is all intolerable.

Mr. Maletz. Did you tell the investment bankers that unless this committee was stopped, the port authority would be in an intolerable position?

Mr. Tobin. I do not remember whether I did or not, but I certainly think the port authority is being subjected to an intolerable position.

Excerpt from Exhibit S-40

Mr. Maletz. Did you convey that thought?

Mr. Tobin. I would have tried to, I assume. I do not remember whether I did or not.

Mr. Maletz. Did you tell those present at this meeting if this committee were allowed to break loose the port authority, it might mean the end of the present Federal tax exemption for the securities of all port authorities in the United States?

Mr. Tobin. Oh, yes.

Mr. Maletz. In other words, Mr. Tobin, this was another instance, was it not, where you appealed to the investment bankers for help.

Mr. Tobin. Yes; it was.

Mr. Maletz. Did the investment bankers respond to your appeal?

Mr. Tobin. I am acquainted with various things——

Mr. Maletz. What did they do?

Mr. Tobin. They communicated with various State and municipal agencies through the country.

Mr. Maletz. Would you like to have the question reread?

Mr. Tobin. Yes.

(The last question was read.)

Mr. Tobin. I am aware of the fact, from reports I had from many of them, that they communicated with State officers and municipal officers, and, as you know very well, many of those Governors, attorneys general, State legislatures, State agencies, did take very proper action, and adopted many resolutions and carried on quite considerable activity of their concern, and are still doing so, and are still concerned about it.

Mr. Maletz. And I take it this was in part due to the response by the investment bankers to your appeal for help?

Excerpt from Exhibit S-40

Mr. Tobin. I hope so. I tried hard enough.

The Chairman. Despite that appeal on your part for help to the investment bankers, and despite whatever the investment bankers may have done, Congress, nonetheless, passed three separate citations for contempt against you and two of your associates by overwhelming majority.

Mr. Tobin. I would rather look at the brighter side—that 124 Members of Congress stood up for what I think was the impropriety of that action.

The Chairman. Well, we are in a democratic process here, and the majority rules. The overwhelming majority.

Mr. Tobin. You won that vote.

Mr. Maletz. Mr. Mintkeski, do you recall sending packets of information to these investment bankers?

Mr. Mintkeski. Yes; I do.

Mr. Maletz. Do you recall sending your card, with the handwriting notation, "more ammunition"?

Mr. Mintkeski. I may have, sir.

Mr. Maletz. Do you recall that you did?

Mr. Mintkeski. That is hard for me to say. I sent information out.

Mr. Maletz. Did you send an accompanying business card——

Mr. Mintkeski. I may have instructed my secretary to do that.

Mr. Maletz. With your notation, "more ammunition"?

Mr. Mintkeski. I could have, sir.

Mr. Maletz. Did you?

Mr. Mintkeski. I don't know.

Mr. Maletz. Let me show you this document and ask you whether you can identify it.

Mr. Mintkeski. Fine.

Mr. Maletz. Is that your handwriting?

Mr. Mintkeski. No, sir.

Excerpt from Exhibit S-40

Mr. Maletz. It is not?

Mr. Mintkeski. No, sir.

Mr. Maletz. Do you know whose it is?

Mr. Mintkeski. I have no idea.

Mr. Maletz. Is that your business card?

Mr. Mintkeski. Yes, sir.

Mr. Maletz. What does it say?

Mr. Mintkeski. The business card itself—it is printed.

Mr. Maletz. The handwritten notation.

Mr. Mintkeski. It looks like more ammunition. I guess that is what it is. More ammunition, sir.

Mr. Maletz. Did you, on behalf of the port authority, submit packets of information to various investment bankers in connection with this matter?

Mr. Mintkeski. Yes; I did.

Mr. Maletz. Were you present at this meeting of the investment bankers?

Mr. Mintkeski. Yes, sir; I was.

Mr. Maletz. When was it?

Mr. Mintkeski. I don't recall the date.

Mr. Maletz. Was it July 14?

Mr. Mintkeski. I haven't the slightest idea.

Mr. Maletz. I show you a letter and ask you if you can identify your handwriting. Is that your handwriting?

Mr. Mintkeski. Yes, sir; that is my signature.

Mr. Maletz. And does that letter refresh your recollection as to when this meeting was held?

Mr. Mintkeski. I forgot to look at the date.

Mr. Maletz. Take a look at the letter, if you would, sir.

Mr. Mintkeski. Sorry. That was held on July 14, according to that memorandum.

• • •

Mr. Maletz. Mr. Mintkeski, would you please sit down.

Mr. Mintkeski. If you wish.

Excerpt from Exhibit S-40

Mr. Maletz. I don't mean that in any surly way at all.

Mr. Mintkeski. No; I can talk better standing up. That is the only reason I do it. I can hear you better, you can hear me better.

Mr. Tobin. Mr. Mintkeski has never been called as a witness in any proceeding, and he is upset about it.

The Chairman. Wait a minute, Mr. Tobin, don't make those statements, because they are unfair and impertinent. Mr. Maletz suggested he sit down because he wants to interrogate you and not Mr. Mintkeski. That is all.

Mr. Maletz. Do you recall now that this meeting was held——

The Chairman. I am glad to see you smile, Mr. Tobin. That is the first smile I have seen on your face all morning.

Mr. Tobin. I thought I had been smiling.

The Chairman. It should be that way all the time.

Mr. Tobin. Thank you. Coming from you, sir, I hope you will do your best from here on to make it so.

The Chairman. I will try to make you smile.

Mr. Maletz. Do you recall now that this meeting was held on July 14?

Mr. Goldstein. Well, why don't you let Mr. Tobin see the letter?

Mr. Tobin. I am not quibbling about the date. There was such a meeting.

Mr. Maletz. How long did this meeting last?

Mr. Tobin. My recollection of it is under an hour.

Mr. Maletz. Did you subsequently have further conversations with these investment bankers in connection with their taking action with respect to this committee's investigation?

Mr. Tobin. I am sure I did; yes.

• • •

Excerpt from Exhibit S-40

[LETTERHEAD OF]

THE PORT OF NEW YORK AUTHORITY

March 3, 1959

Mr. Joseph Ripley
Harriman Ripley & Co., Incorporated
63 Wall Street
New York 5, New York

Dear Joe:

I am enclosing a copy of the Port Authority's letter to Robert W. Purcell in reply to his suggestion that the Port Authority consider the financing of new rolling stock, principally passenger cars, for the commuter railroads. As we advised you this morning and as you will note from our letter, the Commissioners have advised Mr. Purcell that:

> "After study and full consideration, the Board's conclusion is the same with regard to these suggestions of Port Authority participation in financing commuter railroad rolling stock. It remains legally and financially impossible for the Port Authority to provide the equipment under any credit conditions which would be of assistance to the railroads and within their capability."

We have advised Mr. Purcell (page 9) that:

> "Our analysis leads the Commissioners of the Port Authority to conclude, therefore, that these equipment proposals, no matter how set up, would materially impair the Port Authority's credit standing and its ability to fulfill its commitments. This makes it impossible for the Port Authority to participate in any such equipment financing."

Excerpt from Exhibit S-40

Along the lines of our discussions this morning, and particularly in the light of the reliance that your customers through the years have placed on the Authority's conscientious observance of their pledges and commitments to our bondholders, we would like to have the views of your firm on the effect of our acceptance, or attempted acceptance, of any such proposal on the Port Authority's credit.

For your information I am enclosing a copy of the letter that we received last evening from Halsey, Stuart & Co., Inc. in reply to our similar inquiry to that firm.

Cordially,

HOWARD S. CULLMAN
Honorary Chairman

Encls.

Excerpt from Exhibit S-40

[LETTERHEAD OF]

THE PORT OF NEW YORK AUTHORITY

March 2, 1959

Robert W. Purcell, Esq.
30 Rockefeller Plaza
New York, New York

Dear Mr. Purcell:

During the course of our discussion of the commuter railroad problem on February 24th you suggested that the Port Authority consider the financing of new rolling stock, principally passenger cars, with the railroads paying the Port Authority's cost, but without any down payment by the railroads and with payments extended over a period of 25 to 30 years. You asked us to consider some similar advance of funds for capital maintenance, including the rehabilitation of signalling systems.

As you know the Commissioners of the Port Authority had heretofore submitted to the Governors and to the Legislature of New Jersey, their conclusion that it is legally and financially impossible for the Port Authority to assume the railroads' increasingly heavy deficits from all or a part of their commuter operations. During the course of the past week they have reexamined that conclusion, particularly in the light of the type of equipment financing which you suggested on February 24th. After study and full consideration, the Board's conclusion is the same with regard to these suggestions of Port Authority participation in financing commuter railroad rolling stock. It remains legally and financially impossible for the Port Authority to provide the equipment under any credit conditions which would be of assistance to the railroads and within their capability.

Excerpt from Exhibit S-40

At the outset, we must repeat that the Port Authority simply has no revenues or reserves derived from its present operations and facilities which are either legally or financially available for the purchase of railroad equipment. All of the Authority's revenues over and above the costs of operation and maintenance are pledged in such a manner that they must find their way into our bond reserves and the reserves themselves cannot be used except to fulfill obligations to our bondholders. This flow of Authority revenues is governed by bond indentures and statutes which are contractual and which may not be impaired. As a consequence, any possibility of the Port Authority providing money to purchase railroad equipment must rest upon the premise that it can sell its obligations in some form to the public to raise the money. We shall now examine the soundness of that premise.

This premise must be appraised in the light of the magnitude of the requirements of the commuter railroads in the New York-New Jersey area. The Port Authority is a bi-state agency. It could not possibly propose to lend its credit to the New York commuter railroads and deny it to the New Jersey railroads. Furthermore, concurrent legislation in both States would be necessary to complete a workable plan and it is unthinkable that the Legislature of either State would permit a solution of the equipment problem of the railroads of the other state alone.

From our own inquiries and from some of the figures you have given us, we have estimated that the cost of replacing commuter passenger coaches now in use, but which have already been in service for 25 years or more would be between $250,000,000 and $300,000,000 at current prices. Of the 3,450 surburban passenger coaches which are listed by the commuter railroads in the metropolitan area, about 2,570 have been in service over 25 years including 257

Excerpt from Exhibit S-40

owned by the Hudson and Manhattan and 610 owned by the Long Island.

In our discussions you asked us to explore mechanisms by which we might assist in the solution of this phase of that commuter problem. While you stated that you had not yet focused on particular mechanisms, one of the ideas you asked us to explore was that the Port Authority might issue equipment trust certificates.

The true equipment trust certificate as it has been developed under the various plans does not, of course, pledge the trustee's general credit. The trustee is a mere administrative agent for beneficial ownership participations sold to the public, the proceeds of which are used to purchase the equipment which is leased to a railroad or sold on a conditional sale basis.

Quite obviously if the Port Authority were to act as such a mere trustee, it would add nothing to what could be accomplished by any trust company. In fact, since the certificate would not be a Port Authority obligation, the earnings on it would not even qualify for tax exemption under the Internal Revenue Code. Such certificates could be sold if and only if they could also be sold with any other trustee.

We also considered the possibility that the Port Authority might use the proceeds of a Port Authority bond issue, whether of a new or conventional type, to purchase equipment trust certificates which would be serviced by a conventional trustee rather than by the Port Authority itself. We realized, however, that this, too, added nothing to the picture. Since the certificates are evidences of ownership in the rolling stock, under this plan the Port Authority would really be buying the rolling stock. The equipment trust device would add nothing to the possibility of a direct

Excerpt from Exhibit S-40

purchase by the Port Authority if that were otherwise feasible.

We concluded, therefore, that the equipment trust device served no useful purpose in the context of our inquiry. What we were left with, therefore, was a blunt recognition of the fact that we had to appraise the legal and financial possibility of selling Port Authority bonds to raise money to purchase railroad commuter equipment, hoping to recover the investment from rental or conditional sales payments which the commuter railroads might be able to afford and as to which they could provide acceptable evidence of their ability to pay.

We first considered the possibility of a Port Authority obligation not secured by the general credit of the Port Authority but secured only by the equipment itself and the prospect of receiving payments from the railroads over the 25 to 30-year term, without a down payment—the terms which you suggested. This possibility broke down at once because the security would be utterly unsaleable. At least it would be no more saleable if issued by the Port Authority than it would be if issued in the form of a conventional trust certificate on the same terms. In fact, your own premise was that a conventional equipment trust certificate without a down payment and with a 25 to 30-year term could not be sold and that that is why the Port Authority might help if it were able to do so. The premise is certainly sound, but it also produces the result that we could not sell such an obligation since it would have no more security than a private equipment trust certificate.

What would be needed to make a saleable Port Authority obligation would be a pledge of the General Reserve Fund. This fund is the Port Authority's medium for pooling its revenues and assuring its bondholders against the possibility of temporary or compassable deficits.

Excerpt from Exhibit S-40

On examination this alternative also proves to be both legally and financially impossible. Quite obviously, our bondholders would not have loaned us over $850,000,000 (excluding refundings) without requiring contractual assurances that the Port Authority would not undertake such deficit financing as would make its reserves illusory, materially impair the Authority's credit and its ability to fulfill commitments to its bondholders.

The fact is that our contract with Consolidated Bondholders is quite specific in the following provisions:

1. Before the Port Authority has the legal power to pledge the General Reserve Fund in financing a new facility such as these railroad cars would be, the Commissioners must first investigate the financial prospects of the new facility and then certify that the financing will not, during a stated period, "materially impair the sound credit standing of the Authority or the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds." Without such certification the Port Authority cannot pledge any of its reserves in support of the financing of a new facility or operation.

2. The moment a pledge of the General Reserve Fund is involved the required size of that fund itself increases at once by 10% of the principal amount of the new bonds.

3. Finally, the debt service coverage requirement of the Port Authority in connection with the issuance of new Consolidated Bonds requires the Port Authority to compute maximum prospective debt service on all its

Excerpt from Exhibit S-40

bonds including the new bonds and then to be in a position to certify a 1.3 times coverage by net revenues.

The most obvious result of these contractual commitments is that the Port Authority would need a rental or other payment by the railroads equal to 1.3 times the debt service on the $250,000,000 to $300,000,000 of Port Authority bonds to be issued, to avoid diluting the Port Authority's borrowing capacity needed to fulfill commitments. This requirement would substantially reduce the possibility that the Port Authority's participation would be of any practical value to the railroads in their present financial condition, even if it were legally and financially possible.

Another obvious result of these contractual prerequisites to Port Authority financing is that the Authority would have to divert $25,000,000 to $30,000,000 from other revenue sources in order to keep the General Reserve Fund at the 10% contractual figure since no down payment by the railroads is contemplated.

Moreover, to meet these contractual commitments to bondholders, the Commissioners of the Port Authority would, of course, have to have reasonable and satisfactory assurance that the required rentals could be paid by the commuter railroads. In appraising the possibility of any such assurance, we looked into the history of railroad equipment trust certificates which have been publicly sold. The terms of these instruments represent a fair market gauge of the security behind such an arrangement under which rolling stock is made available to a railroad. We found five essential elements of this type of financing which would appear impossible in the context of the proposal you asked us to consider:

Excerpt from Exhibit S-40

1. The railroads make a down payment of as much as 25 percent of the total cost of the rolling stock;
2. The term over which the railroads are required to repay the balance of the owner's cost does not exceed 15 years;
3. The equipment is for the most part freight and not passenger cars;
4. The equipment is non-specialized, high[illegible] adaptable and readily saleable; and
5. The prospects of the carrying charges being met during the specified term are excellent.

As you know, the importance of the down payment and relatively short term lies in the fact that it provides a cushion or "equity" against possible default. The rapidity with which undepreciated equity builds up under the one to fifteen year trust with down payments ranging from 10 per cent to 25 per cent is indicated in the following table:

	Percentage of Equity in Cost of Equipment 1-15 Year Trust Original Equity		
	25%	20%	10%
Inception of trust	25.0	20.0	10.0
at end of 1st year	30.0	25.3	16.0
2nd year	35.0	30.6	22.0
3rd year	40.0	36.0	28.0
4th year	45.0	41.3	34.0
5th year	50.0	46.6	40.0
6th year	55.0	52.0	46.0
7th year	60.0	57.3	52.0
8th year	65.0	62.6	58.0
9th year	70.0	68.0	64.0
10th year	75.0	73.3	70.0
11th year	80.0	78.6	76.0
12th year	85.0	84.0	82.0
13th year	90.0	89.3	88.0
14th year	95.0	94.6	94.0

On the contrary, the schedule which you suggested for Port Authority financing along these lines—a 25 year payoff with no down payment—would start at zero at the inception of the trust and show the undepreciated equity increasing by only 4 per cent a year. At the end of the fifteenth year, fully 40 per cent of the cost would remain unrecovered under the 25 year program, whereas all of it would have been recovered under the 15 year program.

What is more, the 25 year payoff program so closely corresponds to the annual depreciation that the owner would never have any true equity in the equipment. What the owner would have at any time is aging equipment worth little or nothing more than the amount of unrecovered cost. Even when the Federal Government was setting up a railway aid program in the 1958 National Transportation Act (P.L. 85-625, 85th Cong.) it withheld from the Interstate Commerce Commission power to guarantee any loans for railroad aid if "the terms of such loan permit full repayment more than fifteen years from the date thereof."

A relatively short repayment term is extremely important because the only real redress which the owner has if the railroad defaults is to threaten to remove the cars and sell or lease them to another railroad. The ability to do this at a price which would recover all of the cost of the cars not already received from the original railroad is extremely doubtful if the trustee or other owner, in order to recover the balance, must receive practically 100 per cent of their depreciated value at that time.

You stated your opinion that there was no real danger that a commuter railroad would default on any obligation to the Port Authority because the railroad would need its rolling stock to operate. You suggested that therefore the bankruptcy court would order the trustee in bankruptcy to pay the rent or other payment in order to keep the railroad

operating. Our difficulty in accepting this argument arises from the fact that the terms of payment which you proposed would drastically alter the bargaining positions which usually obtain between a trustee owner under an equipment trust and a trustee in bankruptcy who is under instructions to continue operations. When the court and the trustee in bankruptcy understand that the owner of the cars has no real ability to remove them because there is no better market for them, there is no reason to assume that negotiation would not be undertaken to require the car owner to scale down his claims along with those of all other creditors.

There are two other critical aspects of your suggestions that the Port Authority consider the financing of $250,000,000 to $300,000,000 of railroad equipment. First, as we noted above, most existing loans of this kind are to finance freight cars. As of the end of 1958 the distribution of equipment being publicly financed by equipment trust certificates was as follows:

Freight Cars	283,911
Steam Engines	118
Diesel Engines	11,600
Passenger Cars	2,119

Even the relatively few passenger cars are not so specialized as would be most of the new commuter equipment required for the New York and New Jersey railroads. Consider, for example, the equipment needs of the Hudson & Manhattan. The H & M cars are narrower and shorter than most, in order to operate through its present tunnels. We do not know of a single other potential user of such equipment outside of the New York-New Jersey metropolitan area.

Excerpt from Exhibit S-40

The case of the other commuter railroads, while not so extreme, nevertheless involves specialized equipment. These cars would not be saleable for long haul passenger transportation. They could be used only by other railroads engaged in commuter passenger transportation, having re-sale value only in the metropolitan centers of Boston, New York, Philadelphia, Chicago and San Francisco. Yet in each of these centers the commuter railroads are having the same financial difficulties as the New York and New Jersey railroads. They are therefore not potential purchasers in a position to pay a fair purchase price for the cars if a New York or New Jersey railroad defaults.

The second additional and critical aspect of the Port Authority's position as the owner of commuter rolling stock involves the fact that it is a public agency of the two States. Prospective bondholders would have very serious doubts as to the Port Authority's ability to remove cars from a defaulting New York or New Jersey railroad. They would reason that the Port Authority would be subjected to tremendous political and public pressures to permit the continued use of the cars, even though the rental or other payments due to bondholders were in default.

All of these considerations of the difficulty or impossibility of recovering the cost of the railroad cars in the event of default might be irrelevant if we were dealing with first class railroad credits. However, the payments will be due from railroads almost all of which admit that they are either in bankruptcy, or just emerging from bankruptcy, or are on the brink of bankruptcy, or at best in tenuous financial condition.

The H & M is in bankruptcy. The Long Island has emerged from bankruptcy only after many concessions on the part of the State, the municipalities and their mortgage bondholder (the Pennsylvania Railroad)—many of which

Excerpt from Exhibit S-40

concessions are only temporary. Aside from the New York Central and the Pennsylvania, all of the other railroads in the area are so shaky financially that their general credit bonds are rated as "Caa" (Erie and Lackawanna) or "Ca" (New Haven)—by Moody's Investors Service. According to Moody's, the "Caa" rating is for bonds which "are of poor standing. Such issues may be in default or there may be present elements of danger with respect to principal or interest." The "Ca" rating which Moody's has given the New Haven bonds labels them as "speculative in high degree. Such issues are often in default or have other market shortcomings." The New York Central, which has achieved a "B" rating thereby falls in the category where its general credit bonds "generally lack characteristics of a desirable investment. Assurance of interest and principal payments or of maintenance of other terms of the contract over any long period of time may be small." Even the Pennsylvania achieves no more than a "Ba" rating for its general credit bonds so that they "are judged to have speculative elements; their future cannot be considered as well assured. Often the protection of principal and interest payments may be very moderate and thereby not well safeguarded during both good and bad times over the future. Uncertainty of position characterizes bonds of this class."

In addition to all of these circumstances, our Commissioners would also be confronted with the serious effect of such a project on the Authority's credit, in arousing in investors the fear that: (1) the Port Authority was so deeply involved in the railroad commuter deficit problem that it would be unable to extricate itself from responsibility also for tens of millions of dollars of annual *operating* deficits which the commuter railroads state that they are suffering in the New York-New Jersey area now, without

Excerpt from Exhibit S-40

considering any debt service on a rehabilitation and improvement program; and (2) that the Port Authority would have been ear-marked by the two States as the dumping ground for deficit operations of all kinds.

We developed these dangers in our earlier communications to the Governor and to the New Jersey Legislature. They are inseparable from the equipment proposals which you have asked us to review.

We reviewed our conclusions on Port Authority financing of transit systems with Halsey, Stuart & Co., Inc., Drexel & Co., Glore, Forgan & Co. and Ladenburg, Thalmann & Co., syndicate co-managers which traditionally bid on Port Authority bonds. They replied as follows:

> "In our opinion, any involvement, such as the financing of commuter passenger cars for the railroads in the New Jersey-New York metropolitan area, would have a most serious and adverse effect on the credit of the Port Authority. I know the Commissioners of the Port Authority appreciate the fact that even if the Port Authority could legally finance the purchase of such equipment for the local commuter lines, investors are well aware of the financial problems of the commuter railroads and any such action on your part would have an adverse effect on your credit."

When the question of pledging the Authority's General Reserve Fund to finance commuter railroad systems, was before the Committees of the New Jersey Legislature last November, Mr. Reginald M. Schmidt of Blyth and Company (co-managers of another syndicate which consistently bids on Port Authority bonds) wrote:

Excerpt from Exhibit S-40

> "If the Port of New York Authority is to continue expanding its present facilities and other facilities that lend themselves economically to sound revenue bond financing, it would be fatal to the Port's credit if they undertook to finance transit systems by pledging its surplus revenues and general reserve fund.
> "For many years this firm has taken leadership in building up the credit and broadening the market of the Port of New York Authority bonds. I am sure many investors including those whom we have interested would become alarmed if there were any serious consideration by the Commissioners of their entering this field."

And the "Daily Bond Buyer", the trade paper for municipal bond dealers all over the country, said:

> "• • • The Port Authority has excellent reasons and spelled them out plainly early this month in a series of analyses of commuter railroad deficits, the experience of transit systems in other Metropolitan Areas, and *the effect on its own credit and activities of any attempt to participate.* As to the latter, there are impassable legal obstacles and the financial results would be ruinous."

Finally, we should point out that the basic obstacles to a pledge of the Port Authority's Reserves, which I have reviewed, could not be solved even by legislative action in both States. On the other hand, the 1958 National Transportation Act of the Federal Government is available and was designed (as the Port Authority was not) to facilitate a loan of public credit in support of railroads which are in

Excerpt from Exhibit S-40

financial distress. If this Act in its present form imposes standards for railway aid financing which are too rigid to meet the requirements you have outlined, it would seem that they could be amended by Congress.

Our analysis leads the Commissioners of the Port Authority to conclude, therefore, that these equipment proposals, no matter how set up, would materially impair the Port Authority's credit standing and its ability to fulfill its commitments. This makes it impossible for the Port Authority to participate in any such equipment financing.

In this letter we have not reviewed the effect of such a venture on the Port Authority's responsibility, under the Port Compact of 1921, to carry forward a self-supporting program of port development. Nor have we reviewed its effect on our outstanding commitments within the scope of that program. Both of these consequences are covered in the Commissioners' statement to the New Jersey Legislature, which concluded that:

> "At the present time, as is well-known to the Committees, the Port and its activities provide economic support for one out of every four of the 13 million people in the Port District. The responsibility for assuring the continued economic pre-eminence of the Port District, both through providing modern port facilities and promoting the port's commerce, is a responsibility of the very first importance to the people of New Jersey and New York. It would be a great public disservice to the people of New Jersey, and even to the New Jersey rail commuters themselves, if the credit of the Port Authority—which constitutes its whole ability to go forward with its work of port development—were destroyed, as it

Excerpt from Exhibit S-40

> would most certainly be by any attempt to (direct the Port Authority to finance, improve and operate commuter railroad service)."

In view of the effect of this proposal on the Port Authority financing and program, we deem it imperative that the Chairman of our Finance Committee, Commissioner S. Sloan Colt, and I meet with you immediately.

Sincerely,

Austin J. Tobin
Executive Director

Excerpt from Exhibit S-40

30 Rockefeller Plaza
New York 20, N. Y.

Room 5600

March 4, 1959

Mr. Austin J. Tobin
Executive Director
The Port of New York Authority
111 Eighth Avenue
New York 11, New York

Dear Mr. Tobin:

I acknowledge receipt of your letter of March 2nd and I have noted its contents. I am taking the liberty of addressing this letter to you so that I may be certain that I understand completely your position. My uncertainty is due to the emphasis you place upon such factors as the position of the Hudson & Manhattan (which I never visualized as part of the program) a $250,000,000 cost (which I consider to be greatly in excess of the needs) and certain specific lease terms (which I expressed as my ideas, but certainly not as inflexible requirements).

I think I am correct in interpreting your letter as expressing the position of the Port of New York Authority that, under no circumstances, regardless of the amount of money involved, the credit standing of the particular railroads willing to enter such a program, or the terms and conditions of the lease obligations which might be negotiated, would the Authority be prepared to participate in this kind of a program. I would appreciate it if you would confirm the correctness of this interpretation or make such other observations as you might think appropriate because

Excerpt from Exhibit S-40

I wanted to be sure that you have not predicated your views solely on the specific situation as outlined in your letter, whereas, under other or different circumstances, you might be prepared to consider favorably a participation in this kind of a solution of this public problem.

Inasmuch as I am presently preparing a report to the Governor regarding many phases of the transportation crisis and am working against a deadline, I am having this letter delivered by hand with the hope that you may be able to give it very prompt attention.

As stated to you over the telephone yesterday, I shall be happy to meet with you and Mr. Colt whenever you wish.

Sincerely yours,

R. W. Purcell

RWP/s

Excerpt from Exhibit S-40

LETTERHEAD OF

THE PORT OF NEW YORK AUTHORITY

March 5, 1959

Mr. Robert W. Purcell
30 Rockefeller Plaza
New York 20, New York

Dear Mr. Purcell:

Thank you for your further inquiry of March 4th. In reply, please be advised that in reviewing the Port Authority's legal and financial inability to pledge reserves already committed to its bondholders, for the purchase of equipment for the use of commuter railroads, we made the assumptions set forth in my letter of March 2nd.

They were based almost entirely on your outline to me of your objectives, and in fact they constitute the only realistic assumptions we could make.

We assumed that a bi-state agency such as the Port Authority could not attempt to finance only the railroads terminating in one of the two states and refuse to finance those terminating in the other state, when all have a common financial problem. You immediately agreed with this assumption when I suggested it. Certainly the Hudson and Manhattan, whose counsel has just been added to your staff, could not be omitted from a bi-state agency's program of commuter railroad financing. In fact, you yourself included the Hudson & Manhattan's capital requirements in our discussion during the course of our first meeting and asked me to submit a memorandum on its financial requirements as we saw them, which I did on February 23rd.

Excerpt from Exhibit S-40

In our letter of March 2nd we assumed a $250,000,000 to $300,000,000 cost based again on the only realistic assumption we can make and based on the actual number of over-age commuter cars in use in the area and the present cost of replacement. We did not include the necessity of rehabilitating signalling equipment, and other essential capital maintenance which, in the cases of the Long Island and Hudson and Manhattan alone are estimated by Mr. Goodfellow and Mr. Stichman at $40,000,000. I am surprised that you now take the view that is greatly in excess of the needs of the New York and New Jersey commuter railroads, when both you and Mr. Goodfellow, whom you sent to see me, estimated the Long Island's requirements alone at $70,000,000 and Mr. Stichman places the Hudson & Manhattan's needs at $50,000,000. The remainder is taken up by the needs of the New Haven, Erie, Lackawanna, Jersey Central, New York Central and Pennsylvania. At our meeting in my office on February 25th, Mr. Genet put these requirements of the Long Island, and the commuter services of the New Haven and New York Central at $200,000,000.

Certainly the people who buy the Port Authority's bonds —insurance companies, banks and private individuals— when they came to appraise our credit, would have to assume that this bi-state agency would be committed to the entire $250,000,000 to $300,000,000, with the possibility of being called upon to finance additional commuter operating deficits later on. We know of no way, short of a constitutional restriction, which would freeze the Port Authority's participation in railroad aid financing to the needs of anything less than all the commuter railroads in the area, to only their equipment needs or to their needs only at this time.

Excerpt from Exhibit S-40

On the same basis, there is no question of appraising "the credit standing of the particular railroads willing to enter such a program." All of the commuter railroads are involved from the point of view of appraising a disastrous impairment of Port Authority credit, no matter how you might attempt to limit any initial plan. In this connection we did not make any asumptions of our own as to the credit standing of the commuter railroads. Instead, we used the Moody's Investors' Service ratings of their general credit obligations.

As we pointed out, with the type of specialized and unsaleable commuter equipment which the railroads need we would have little more than their general credit behind their promise to pay, whereas in any feasible plan the Port Authority's obligation to pay principal and interest on our railroad aid bonds would be absolute.

When we came to assume "the terms and conditions of the lease obligation which might be negotiated," we accepted your completely reasonable assumption that the commuter railroads were not in a position to make any normal down payment or to pay off these new obligations within the normal term used by equipment trust financing. Any requirements which a Port Authority lease might impose which approached this normal down payment and term would defeat your entire purpose of helping the railroads out of financial distress and at the same time make the Port Authority's participation unnecessary, since private financing should then be available.

In fact, Mr. Goodfellow, whom we met at your suggestion, and Mr. Genet of your staff expressed the view that the Long Island, to accomplish its objectives, would need a 30-year pay off payment period, could make no down payment, could procure no guarantee from its owner, the

Excerpt from Exhibit S-40

Pennsylvania Railroad, and could not even procure a subordination of the Pennsylvania Railroad's deferred claim for interest on the Long Island's mortgage bonds to the proposed new Port Authority obligation.

Mr. Goodfellow also made it clear that the Long Island, even with these extreme departures from normal equipment financing, could not undertake to pay more than the actual debt service we might incur on our obligations issued to finance the Long Island's requirements. In our prior letter we pointed out that under the contractual provisions of our Consolidated Bond Resolution our revenues must equal at least 1.3 times the maximum prospective debt service on our bonds before we can issue new Consolidated Bonds. As we pointed out to the New Jersey Legislature, our present program of contractual commitments brings us very close to this 1.3 requirement in the next few years. We could not continue to borrow new money if we diluted our revenues with a huge volume of railroad aid bonds against which we were receiving from the railroads only a one time coverage of our debt service. Consequently, with the Port Authority's entire future program imperiled on such a basis, the Commissioners could not possibly certify any such railroad aid proposal as conforming to the requirements of the bond indenture. They would be unable to do so under their pledge to outstanding bondholders even if there were no question of the railroad's ability to meet their obligations to the Port Authority.

No matter what the terms and conditions of the lease obligations would be the Port Authority credit could not but be impaired if the program did not afford either good security in the form of readily saleable equipment or a good credit in back of the promise to pay. Unfortunately, in our analysis, your proposal offers Port Authority bondholders neither good security nor good credit.

Excerpt from Exhibit S-40

There is one circumstance which we did not mention in our letter of March 2nd and which might make it possible for the Port Authority to undertake the program you suggested. This would be a guarantee by either or both of the States of the rental or other obligations of the railroads under any lease or other agreement entered into with them. We did not mention this because such a guarantee would make the Port Authority's participation unnecesary; the commuter railroads could sell their own equipment trust certificates with such a guarantee and presumably on much more satisfactory terms than we could hope to offer.

When our bondholders received the contractual assurance that our General Reserve Fund would not be pledged in connection with the financing of additional facilities unless the Commissioners of the Port Authority certified that the pledge would not impair the Port Authority's credit standing, the bondholders were relying upon the judgment nd integrity of the Commissioners of the Port Authority. This is a responsibility under their bond contracts which the Commissioners cannot, as a matter of law, delegate to anyone else. The fact is that the Commissioners, out of a wealth of experience in both public and private finance, with intimate knowledge of the Port Authority's commitments and finances, and after consultation with the managers of the investment syndicates which bid upon their bonds, have concluded that any Port Authority program which would be of assistance to the railroads, would damage the Port Authority's credit standing and impair its ability to fulfill its commitments.

It would appear to us that there is presently available under the National Transportation Act a source of financial assistance to the railroads which offers a much more fruitful, proper and appropriate avenue toward a possible solution of the railroads' financial problems.

Excerpt from Exhibit S-40

We realize there are certain provisions of that Act, such as the prohibition against the payment of railroad dividends during the period of the Federal guarantee, which may be unpalatable to railroad management. It would seem, however, that rather than recommend a course which the Commissioners of the Port of New York Authority would consider dishonorable and which we must reaffirm is legally, financially and contractually impossible, effort should rather be directed to amending those objectionable details of the existing Federal legislation.

Sincerely,

AUSTIN J. TOBIN
Executive Director

Excerpt from Exhibit S-40

[LETTERHEAD OF]

THE PORT OF NEW YORK AUTHORITY

LEE K. JAFFE
Director of Public Relations
Algonquin 5-1000

FOR RELEASE: Monday A.M.
March 16, 1959

New York, Mar. 16—Donald V. Lowe, Chairman of The Port of New York Authority, and S. Sloan Colt, Chairman of the Authority's Finance Committee, in a joint statement declared today that the Port Authority was quite pleased that, in the report submitted to Governor Nelson Rockefeller today by Mr. Robert W. Purcell, a way had been found that makes it possible for the Port Authority to be of assistance in working out the commuter rail problem.

Chairman Lowe and Commissioner Colt noted that the purchase of commuter rail equipment is to be financed, as recommended by Mr. Purcell, by a combination of New York State advances of funds, along the lines of the original George Washington Bridge financing, and by special Port Authority securities guaranteed by the State of New York, along the lines of the State Thruway financing. They stressed that such financing in no way impairs the legal and contractual obligations of the Port Authority to its bondholders, nor does it impair in any way the Authority's credit or its ability to continue its work of port, airport and arterial development.

The plan recommended by Mr. Purcell necessarily avoids any use of the Port Authority's existing revenues and reserves, all of which have been pledged to support outstanding bonds. It would substitute a state guarantee, after a constitutional amendment, to back up new bonds for the purchase of new commuter railroad cars which the Port Authority would rent to the railroads on a rental schedule calculated to recover the cost of the equipment. Until the constitutional amendment is adopted State funds would be advanced with which equipment orders could be placed and the program begin to roll.

Excerpt from Exhibit S-40

PORT AUTHORITY COMMISSIONERS REACT FAVORABLY TO RECOMMENDATIONS SUBMITTED TO GOVERNOR ROCKEFELLER BY ROBERT W. PURCELL, ADVISOR ON THE NEW YORK COMMUTER RAIL PROBLEM—2

The Commissioners said that the Authority's Executive Director, Austin J. Tobin, has worked in close collaboration throughout the past month with Mr. Purcell as well as with New Jersey State Highway Commissioner Dwight R. G. Palmer, who has been acting as Governor Robert B. Meyner's coordinator of the commuter problem in New Jersey. Commissioner Palmer has been kept fully informed and, from time to time, has reviewed the progress of the plan with both Mr. Purcell and Mr. Tobin.

In their statement Chairman Lowe and Commissioner Colt reaffirmed the view of the Commissioners of the Port Authority, as indicated in their statement before the New Jersey Legislature last November, that: "Both rail and highway transportation are essential to the economic welfare of the New York-New Jersey Metropolitan Region."

Excerpt from Exhibit S-40

It was for this reason that the Port Authority made available to the Metropolitan Rapid Transit Commission over $800,000 to undertake its recent interstate transit survey. It was also for this reason that the Port Authority has devoted its attention and study to the rail rapid transit problem for the past thirty years.

At the same time, the Commissioners emphasized: "The Port Authority's comprehensive program of providing modern port, terminal and transportation facilities on a self-supporting basis is indispensable to the continued preeminence of the Port of New York. The preservation of the Authority's credit is the whole basis of this program. Any approach to the rapid transit problem that involved the impairment of that credit would be self-defeating.

PORT AUTHORITY COMMISSIONERS REACT FAVORABLY TO RECOMMENDATIONS SUBMITTED TO GOVERNOR ROCKEFELLER BY ROBERT W. PURCELL, ADVISOR ON THE NEW YORK COMMUTER RAIL PROBLEM—3

"Mr. Purcell's recommendations to the Governor for the financing of commuter rail equipment is consistent with these principles" the Commissioners concluded. "It is therefore feasible and workable and at the same time safeguards the Authority's credit. If the two States authorize us to go forward they may be assured of our best efforts to work out our part of the program and in doing so protect the interests of the commuters, the States and the railroads themselves."

Excerpt from Exhibit S-40

EXCERPTS OF MR. ROBERT W. PURCELL'S RECOMMENDATIONS TO GOVERNOR NELSON ROCKEFELLER

The railroads serving residents of New York in commuter service are prepared to enter into agreements to continue to provide the service and to lease on reasonable terms over a long period of years such new equipment as will be required to revitalize the service. I therefore recommend that the Port Authority purchase commuter railroad equipment and lease the same to the railroads for, say, 25 years, at a rental which would reimburse the Authority for its total cost, including carrying charges, over the term of the lease. This would give the railroads the opportunity to obtain modern equipment without any down payment and on terms which will give them the advantage of the ability of the Port Authority to issue long-term bonds carrying tax-free interest coupons and hence the lowest possible financing costs.

If promptly adopted, such a program could commence to provide new riding comfort for commuters sometime during 1960. Inasmuch as railroads entering into such leases will contractually agree not only to pay the rental during the term of the lease but also to operate the equipment, this will relieve the communities of the ever-present threat provided by the Federal Transportation Act of 1958 that commuter service may be discontinued.

The view has been expressed that any extensive program of this character might have an adverse effect on the Port Authority's credit, particularly if equipment should be leased to railroads such as the New Haven and Long Island, whose financial condition is not strong. It is my personal belief that these roads, as well as the New York Central, will be bringing commuters to New York for more years than will be covered by the proposed leases and, that

Excerpt from Exhibit S-40

irrespective of what may happen generally to these roads, the agreed rental will be paid for the equipment. Nevertheless, I realize that both existing and prospective Port Authority bondholders might not share this view, and for the Port Authority to enter into such a program at this time on its own credit might have an adverse effect on the credit rating of its bonds. Furthermore, the indenture securing the Port Authority's outstanding Consolidated Bonds provides in substance that 1.3 times debt service on new bonds should be realizable from projects financed with the proceeds thereof. If this coverage requirement should be applicable to railroad equipment, the rental requirement would be excessive.

These adverse results may be avoided if the State assures the Port Authority that it will be held harmless in the event of loss resulting from default on a railroad equipment lease. This could be done either (a) through an advance to be made by the State to the Port Authority for this purpose, repayable only out of the rental and/or sale of the equipment, or through refinancing as described below or (b) by a State guarantee running either in favor of the bondholders or directly to the Port Authority. I am advised that a constitutional amendment would be necessary for either of the guarantees required under (b) above and that such amendment could not be submitted to the voters until the general election in 1961. The problem is so critical that any such delay would be unwarranted and, accordingly, I propose the adoption of necessary legislation to enable the State to allocate up to $20,000,000 of its capital construction funds so that they may be drawn down by The Port of New York Authority under the conditions stated above for the purpose of acquisition and leasing commuter equipment.

Excerpt from Exhibit S-40

By using these funds it should be possible to expand the equipment purchase program through monies derived from private banking sources based upon the pledge of the payment of railroad rentals or other payments on a normal equipment trust schedule and having the equity advantage, say to the extent of a 25% down payment on the equipment, provided by the State advances to the Port Authority. Repayment of the State's advances would be subordinated to such bank loans. By resort to such private sources, sufficient funds might be made available to meet the entire reasonable needs for new equipment of the three commuter railroads serving residents of New York.

In order to make it possible for the Port Authority to market securities either for its purchase of commuter railroad equipment to be leased to the railroads, or for repaying advances received from the State for this purpose, it would be necessary for the State of New York to guarantee the securities generally along the lines of its guarantee of New York State Thruway bonds. A constitutional amendment authorizing this guarantee could be submitted to two successive legislatures and to the people of the State at a general election as required.

The bi-state legislation necessary for this arrangement would involve only approval of the purpose of this type of financing and would leave both States free to go forward or not as each might choose with the type of commuter railroad equipment financing for which New York desires to employ the Port Authority's experience and trained personnel. In order to avoid a railroad rental equal to 1.3 times the debt service on the new securities, it would be necessary to avoid a pledge of the Port Authority's General Reserve Fund (already pledged to the holders of Consolidated Bonds and bonds of prior issues). Therefore, the

Excerpt from Exhibit S-40

legislation would contemplate a special issue of new Port bonds secured by the equipment, the rentals from or other payments by the railroads, and the State's guarantee.

If the definitive bonds to be sold by the Port Authority under the terms of the State guarantee to be permitted by the amendment to the Constitution are sold before the State's advances have been repaid out of collections from the railroads, then the advances would be repayable out of the proceeds of such definitive bonds.

Pending the adoption of a Constitutional amendment, New York legislation would be required to authorize the immediate advance to the Port Authority and to enable it to enter immediately into agreements with the railroads and the manufacturers for the purchase of new commuter rolling stock urgently needed for the continued safe operation of commuter rapid transit. This is necessary because the Port Authority has no revenues or reserves which can be pledged or applied to this purpose.

This is essentially the method followed by the two States in making advances for the start of construction on both the George Washington Bridge and the Staten Island Bridges. $17.5 million was advanced by the two states, $5 million by each state for the George Washington Bridge and $4 million by each state for the Staten Island Bridges. These advances were subsequently repaid to the States. The legislation providing for these advances for the George Washington Bridge, for example, (Chapter 761 Laws of New York 1926 and Chapter 6 Laws of New Jersey 1926) provided that "in aid of the prompt and economic construction of the bridge *** the State of New York agrees *** to provide and make available *** the sum of $5 million, or so much thereof as may be requisitioned." The George Washington Bridge and Staten Island Bridges financing statutes

Excerpt from Exhibit S-40

provided for the making of the advances in five equal annual installments. The legislation also provided for the subordination of the State's advances to the lien of the holders of securities issued to raise the balance of the construction costs.

The foregoing proposal would give to the people of the State the benefit of the experience and efficiency of the Port Authority and its broad background in all phases of transportation in the New York Metropolitan area. The Authority would, of course, have the right to decline to supply equipment unless it was satisfied that it was the right equipment, that it was needed, and that it would be reasonably justified under prevailing conditions. In other words, the Authority would be expected to apply sound business judgment in working out the program. Additionally, because the resources of the State would be involved, equipment purchases should be subject to review by the State Comptroller.

It will be necessary for the State of New Jersey to pass companion enabling legislation. I can see no valid reason for objection by that state. On the contrary, the enabling legislation passed by New York would make it possible for New Jersey to provide its railroads with new equipment, provided New Jersey advances funds or authorizes bond guarantees along lines similar to those proposed above for New York.

Suggested legislation to accomplish the foregoing is presently being prepared and will be forwarded to you shortly.

Exhibit S-44

(Memorandum dated April 22, 1974)

MEMORANDUM April 22, 1974

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

I am advised by counsel that at a meeting with Port Authority counsel and our New Jersey Counsel today, it was understood and agreed that upon the prospective enactment of the New Jersey legislation repealing the "1962 Covenant", the Trust Company would bring an action against the State of New Jersey and its officers seeking a declaratory judgment that such legislation is null and void because violative of the the State Constitution and that the 1962 Covenant is a valid and binding contract between the Authority and its bondholders. The Trust Company would seek recognition by the Court of its status as representative of the class of all outstanding bondholders and as indenture trustee of Consolidated Bonds Series 40 and 41, and its compensation, including fees and expenses of counsel, would be paid by the Authority.

As this action will proceed in the next several days, please let me know if you have any further questions following your general approval of proposed legal action expressed to me on April 18 and 19.

J. SINCLAIR ARMSTRONG

To: Dr. O'Leary
Mr. Heard

Exhibit S-56

MASSACHUSETTS PORT AUTHORITY

4¾% 1998

1961

	Date	Bid	Asked
March	1	108¼	109¼
	2	Not Reported	
	3	107¾	108¾
	4	107½	108½
Sun.	5	—	—
Mon.	6	—	—
	7	107¼	108¼
	8	107¼	108¼
	9	107¼	108¼
	10	107¼	108¼
	11	107¼	108¼
Sun.	12	—	—
Mon.	13	—	—
	14	107¼	108¼
	15	107	108
	16	106½	107½
	17	106½	107½
	18	106	107
Sun.	19	—	—
Mon.	20	—	—
	21	106	107
	22	105½	106½
	23	105½	106½
	24	105½	106½
	25	105½	106½
Sun.	26	—	—

Exhibit S-56

	Date	Bid	Asked
Mon.	27	—	—
	28	105½	106½
	29	105½	106½
	30	105½	106½
	31	105½	106½
April	1	No Prices Reported	
Sun.	2	—	—
Mon.	3	—	—
	4	105¼	106¼
	5	105	106
	6	105	106
	7	105	106
	8	105	106
Sun.	9	—	—
Mon.	10	—	—
	11	105	106
	12	105	106
	13	105	106
	14	105	106
	15	105	106

SOURCE: New York Times

Exhibit S-56

NEW YORK PORTS CONSOLIDATED

3-40% 1987

1961

	Date	Bid	Asked
March	1	95	—
	2	95	—
	3	95	—
	4	95	—
Sun.	5	—	—
Mon.	6	—	—
	7	95	—
	8	95	—
	9	95	—
	10	95	—
	11	95	—
Sun.	12	—	—
Mon.	13	—	—
	14	95½	—
	15	95½	—
	16	95½	—
	17	95½	—
	18	95½	—
Sun.	19	—	—
Mon.	20	—	—
	21	95	—
	22	94½	—
	23	94½	—
	24	94½	—
	25	94½	—
Sun.	26	—	—

Exhibit S-56

	Date	Bid	Asked
Mon.	27	—	—
	28	94½	—
	29	94½	—
	30	94½	—
	31	94½	—
April	1	No Prices Reported	
Sun.	2	—	—
Mon.	3	—	—
	4	94½	—
	5	94½	—
	6	94½	—
	7	94½	—
	8	95	
Sun.	9	—	—
Mon.	10	—	—
	11	94½	—
	12	94½	—
	13	94½	—
	14	94½	—
	15	94½	—

SOURCE: NEW YORK TIMES

Excerpt From Exhibit C-3

THE PORT AUTHORITY OF NEW YORK and NEW JERSEY

1972 ANNUAL REPORT

"The highlight of 1972 was the announcement by your Excellencies in mid-November of a bi-State plan for major rail mass transportation development by the Port Authority, and the passage of the necessary enabling legislation in New Jersey. Detailed engineering planning and negotiations on the $650 million project, which was planned by the Port Authority in close cooperation with the New Jersey Department of Transportation and the Metropolitan Transportation Authority, proceeded immediately in anticipation of legislative approval so construction could begin as soon as possble in 1973."

• • •

"PLANNING FOR THE FUTURE"

The most significant event of 1972 was the announcement by the two Governors of an agreement with the Commissioners of the Port Authorty on a bi-State plan of major rail mass transportation improvement by the Port Authority. The plan was developed by the Port Authority in close cooperation with the New Jersey State Department of Transportation and the Metropolitan Transportation Authority, a New York State agency. It calls for the expenditure of approximately $650 million for capital improvements to be financed by a combination of Federal, State and Port Authority funds. The Port Authority's investment in these improvements is expected to total $250-300 million.

Excerpt From Exhibit C-3

Legislation to authorize the project was passed by the New Jersey Legislature and signed by Governor Cahill before the end of the year.*

The plan provides for:

—rail rapid transit service on the Port Authority Trans-Hudson (PATH) System from Penn Station, Newark, into Union County to Plainfield, New Jersey, via Newark International Airport.

—direct rail service to Pennsylvania Station, New York in mid-Manhattan for New Jersey and New York riders of the Erie Lackawanna Railway in Bergen, Passaic, Morris, Union, Somerset and Essex Counties in New Jersey and Rockland and Orange Counties in New York. Under the plan, Erie Lackawanna commuters will thus have the option of direct service to mid-Manhattan as well as to Hoboken where transfer to PATH for the trans-Hudson trip would continue to be available.

—direct high-speed rail service between Manhattan and John F. Kennedy International Airport.

The legislation eliminates a previous statutory requirement that the Kennedy and Newark Airport projects must proceed simultaneously as a "single port development project."

By the end of 1972, the Port Authority was doing preliminary work on these plans in close cooperation with the two State transportation agencies, the Federal Government, the railroads and municipalities directly involved, and others. Detailed engineering planning and negotiations were under way in anticipation of legislative approval so

* Identical legislation was under consideration by the New York Legislature in March 1973 as this report went to press.

Excerpt From Exhibit C-3

that construction might begin as soon as possible in 1973 on one or more of the projects. The program is expected to be completed by the end of 1977.

The provision of rail service to Newark International Airport calls for the use of existing PATH trackage from Newark's Penn Station to South Street; new tracks running adjacent to Penn Central tracks from South Street to a new station at the airport, and a connection to the airport's planned internal transportation system.

New PATH tracks would run from Newark Airport south to a connection with the mainline of the Central Railroad of New Jersey, in order to use the CNJ right-of-way to Plainfield and to provide improved rail service to 7,600 daily CNJ riders who now change to PATH trains at Newark. The distance of the new PATH rail transit service is to be approximately 18 miles.

Preliminary steps were taken at year's end to implement the plan for expanded direct rail service for several branches of the Erie Lackawanna Railway to Pennsylvania Station, New York. This program encompasses direct commuter rail service for passengers from Morris, Union, Somerset and Essex Counties on the Morris and Essex Division of the Erie Lackawanna into mid-Manhattan by means of direct track connections at Kearny, New Jersey between the Erie Lackawanna and Penn Central; a new railroad bridge across the Hackensack River; and direct track connections at Secaucus between the Penn Central and the Erie Lackawanna's Bergen County line to serve the Meadowlands, Bergen and Passaic Counties in Northern New Jersey and Rockland and Orange Counties in New York. The plans also include extensive track and signal improvements, a new railroad yard and substantial improvements to Penn Station, New York.

Excerpt From Exhibit C-3

Significant travel time savings for some 20,000 daily Erie Lackawanna commuters desiring rail access to and from the mid-Manhattan area would be realized from this plan which also could provide other benefits such as direct rail service to projected new developments in both States.

Planning went forward as well with the Metropolitan Transportation Authority and the airlines for extending the Long Island Rail Road to Kennedy Airport to provide service to and from Penn Station in New York and Jamaica.

This project would provide an electrically powered rail service between Pennsylvania Station in Manhattan and a rail terminal station within the Central Terminal Area of Kennedy Airport. The approximate running time from Penn Station to an airline unit terminal at Kennedy would be 28 minutes, including the use of passenger distribution system.

A second service for Queens, Nassau and Suffolk counties would run from the Long Island Rail Road's Jamaica Station over the Montauk Branch to its intersection with the route taken by the trains from Penn Station. The service would then operate in common with the Penn Station service to the same Central Terminal Area rail station.

Brooklyn service would be provided from a station in Woodhaven, Queens, at a point where the airport route crosses Atlantic Avenue.

A separate passenger distribution system ("people mover") would link each airline unit terminal to the proposed rail terminal within the Central Terminal Area. This system to distribute passengers from the rail line to their individual airline destinations would also serve as an interline transportation system.

Excerpt From Exhibit C-3

The rail service between Manhattan's Penn Station and the Long Island Rail Road's Jamaica Station into Kennedy Airport is expected to accommodate over 10 million passengers annually by the year 1982.

In addition, negotiations began during the year with the Penn Central Transportation Company for PATH's operation and rehabilitation of Penn Station, Newark.

• • •

"Basic Policies and Financial Structure

The States of New Jersey and New York directed the Port Authority ". . . to proceed with the development of the Port of New York . . . as rapidly as may be economically practicable . . .". The Authority, however, may not levy taxes, assessments or pledge the credit of either State or any municipality. In other words, its program of public works was to be supported and financed by the private sector, and to this end the two States pledged their "cordial cooperation . . . in the encouragement of the investment of capital . . .".

In order to finance—on a self-supporting basis and without cost to the general taxpayer—the land, sea and air terminal, transportation and other facilities of commerce as directed by the two State Legislatures, it is necessary for the bi-State agency to conduct its affairs with prudence and to employ sound management practices in order to build a strong credit base and sound financial structure.

To achieve the continuing objectives of strength and stability in its financial structure and command the confidence of investors, it is necessary for the Port Authority to meet certain legal and fundamental financial standards.

The statutes establishing the General Reserve Fund provide for the pooling of revenues to the end that older facili-

Excerpt From Exhibit C-3

ties with established earning power can aid new projects during developmental periods until they reach their anticipated point of self-support. These statutes provide for the amount of the General Reserve Fund to be equal to ten percent of the total par value of the Authority's outstanding bonds including Consolidated Bonds.

The Port Authority's long-established policy is to retire bonded debt as rapidly as sound financial management permits and to maintain, at year-end, a combined amount in its reserve funds, including reserve funds in trust, equal to at least the next two years' mandatory bonded debt service. Acceleration of debt retirement before mandatory dates may be accomplished out of the General Reserve Fund only to the extent that reserve funds exceed the ensuing two years' debt service.

Bonds for an additional facility cannot be issued with a pledge of the General Reserve Fund unless the Port Authority Commissioners certify to investors that the pledge will not materially impair the sound credit standing of the Authority, the investment status of the Authority's bonds, or the ability of the Authority to fulfill its commitments and undertakings.

Judicious planning, advanced engineering techniques and sound management practices are utilized to bring new projects to their anticipated point of self-support as soon as possible.

Adherence to these requirements and policies has resulted in a sound financial structure which has been recognized by individual investors and financial institutions throughout the United States. Over the years, more than three and one-half billion dollars of Port Authority obligations have been purchased by investors, of which only one and one-half billion dollars was outstanding at December 31, 1972.

• • •

Excerpt From Exhibit C-3

"ADDITIONAL INFORMATION FOR BONDHOLDERS

Consolidated Bonds are direct and general obligations of the Authority and the full faith and credit of the Authority are pledged to the payment of debt service thereon.

All Consolidated Bonds, including any which may hereafter be issued, are equally and ratably secured by a pledge of the net revenues of all existing facilities of the Authority (not including cars acquired under New York State's Commuter Railroad Car Program) and any additional facility which may be hereafter financed in whole or in part through the medium of Consolidated Bonds, as provided in the Consolidated Bond Resolution. The prior liens and pledges with respect to certain of such net revenues in favor of General and Refunding, Air Terminal and Marine Terminal Bonds of the Authority referred to in the Consolidated Bond Resolution have been satisfied by the establishment and maintenance of the Special Air Terminal and Marine Terminal Reserve Funds in Trust • • • . All Consolidated Bonds are further secured by a pledge of the monies in the Consolidated Bond Reserve Fund, as provided in the Consolidated Bond Resolution.

On December 31, 1972, outstanding Consolidated Bonds totaled $1,523,334,000. Over the years, the Authority has issued $2,241,650,000 of Consolidated Bonds, exclusive of refundings.

The 1962 statutes adopted by the Legislatures of New York and New Jersey, which authorized Port Authority acquisition of the interstate Hudson and Manhattan Railroad, provided by way of a statutory covenant with the holders of affected bonds that deficit financing of additional passenger railroad facilities would be undertaken only

Excerpt From Exhibit C-3

within specific financial limits. Bi-state legislation is now pending which, after its enactment, would exclude obligations to be issued by the Authority from the category of such affected bonds. It may be noted that in connection with the issue of $100,000,000 par value of Consolidated Notes, Series Z, 3.60% due December 17, 1973, referred to above, Chase Manhattan Bank, First National City Bank, Morgan Guaranty Trust Company of New York, Chemical Bank, Manufacturers Hanover Trust Company, Franklin National Bank, Marine Midland Bank (New York), National Newark and Essex Bank, The Bank of New York, Fidelity Union Trust Company, Irving Trust Company, Marine Midland Bank (Western), Peoples Trust of New Jersey, United States Trust Company of New York, The Bank of Tokyo Trust Company and The County Trust Company each consented pursuant to Section 6 of both Chapter 209 of the Laws of New York of 1962 and Chapter 8 of the Laws of New Jersey of 1962 to the application for any railroad purpose authorized by the States of New York and New Jersey of any rentals, tolls, fares, fees, charges, revenues and reserves which have been or shall be pledged as security for such Notes, insofar as such application would otherwise not have been permitted by reason of the limitations imposed by the statutory covenant. In accordance with the policy of the Governors of New York and New Jersey and of the Authority, this consent by these purchasers of Consolidated Notes, Series Z avoided the addition of such Notes to the total amount of outstanding obligations to which the statutory covenant attaches. The need for such consent by the purchasers of future Authority obligations would be obviated by enactment of the pending legislation."

Excerpt from Exhibit C-4

THE PORT AUTHORITY OF
NEW YORK AND NEW JERSEY

1974 ANNUAL REPORT

"PLAINFIELD CORRIDOR SERVICE PROJECT

The Port Authority applied for federal capital funding for the Plainfield Corridor Service Project in April 1974. The project provides for a 17.5 mile extension of PATH from its present terminus at Penn Station, Newark, to Plainfield via stations serving Newark International Airport and Elizabeth.

In October at the request of the Urban Mass Transportation Administration, a joint Task Force composed of members of the Port Authority and the New Jersey Department of Transportation was established to reevaluate the PATH Plainfield project as well as other potential public transportation alternatives for the Plainfield Corridor.

"As the year ended, the Task Force's evaluation was presented to Governor Byrne, who announced his view on February 10, 1975 that the Port Authority should proceed with the PATH extension to Plainfield. Staff work is going forward on the necessary supplement to the Port Authority's Plainfield application for federal funding, revising the project cost estimates and federal aid requirements. The Joint Task Force estimated in its report that $278 million in federal aid is necessary for project work west of Newark, representing 80 percent of its estimated $347 million cost eligible for federal aid. The Port Authority is working with the State of New Jersey to determine how the local share of Plainfield project funding can be structured in keeping with the legal limitations

Excerpt from Exhibit C-4

on Port Authority participation and resolution of how any future operating deficits would be accommodated."

"PENN STATION (N.Y.) DIRECT ACCESS PROJECT

Port Authority staff continued to design and plan direct rail service into Penn Station, New York for commuter trains of the Erie Lackawanna Railway. Test borings were begun in 1974 for track connections between the Penn Central and Erie Lackawanna and for a new high-level fixed-span bridge over the Hackensack River. The Federal Railroad Administration also announced that federally sponsored management studies of Penn Station, New York were to be completed in the spring of 1975."

• • •

"NEW YORK STATE COMMUTER RAILROAD EQUIPMENT PROGRAM

A total of 467 air-conditioned passenger cars and eight diesel-electric locomotives have been purchased for use in commuter service within the State of New York on the Penn Central and Long Island railroads since 1962 under the New York State Commuter Railroad Equipment Program. To date, special state-guaranteed Port Authority bonds in the amount of $106,225,000 have been issued to finance rolling stock for commuter rail service and $86,160,000 are now outstanding."

• • •

"BASIC POLICIES AND FINANCIAL STRUCTURE

The States of New Jersey and New York directed the Port Authority "... to proceed with the development of the Port of New York ... as rapidly as may be economically practicable ..." The Authority, however, may not levy taxes, assessments or pledge the credit of either State or

Excerpt from Exhibit C-4

any municipality. In other words, its program of public works was to be supported and financed by the private sector, and to this end the two States pledged their "cordial cooperation ... in the encouragement of the investment of capital ..."

In order to finance—on a self-supporting basis and without cost to the general taxpayer—the land, sea and air terminal, transportation and other facilities of commerce as directed by the two State Legislatures, it is necessary for the bi-State agency to conduct its affairs with prudence and to employ sound management practices. Over the years, more than 3.5 billion dollars of Port Authority obligations have been purchased by investors of which 1.7 billion dollars was outstanding at December 31, 1974.

The statutes establishing the General Reserve Fund of the Authority provide for the pooling of revenues to the end that older facilities with established earning power can aid new projects during development periods until they reach their anticipated point of self-support. These statutes provide for the utilization of available net revenues to maintain the General Reserve Fund at the prescribed amount of ten percent of the total par value of the Authority's outstanding bonds.

The Port Authority's long-established policy is to retire debt as rapidly as sound financial management permits and to maintain, at year-end, a combined amount in its reserve funds, including reserve funds in trust, equal to at least the amount of the next two years' mandatory bonded debt service. Acceleration of debt retirement before mandatory dates may be accomplished out of the General Reserve Fund only to the extent that reserve funds exceed the ensuing two years' debt service.

Bonds for an additional facility cannot be issued with a pledge of the General Reserve Fund unless the Port Author-

Excerpt from Exhibit C-4

ity Commissioners certify to investors that the issuance of the bonds or that such pledge will not materially impair the sound credit standing of the Authority, the investment status of the Authority's bonds, or the ability of the Authority to fulfill its commitments and undertakings.

In 1974, the Legislatures of New York and New Jersey repealed a statutory covenant with holders of affected Port Authority bonds which permitted deficit financing of passenger railroad facilities in addition to the Hudson Tubes (Port Authority Trans-Hudson [PATH] System) only within specified financial limits. The covenant was originally adopted in 1962 as part of the statutes authorizing Port Authority acquisition of the inter-state Hudson and Manhattan Railroad. In 1973, the two States had enacted legislation to preclude application of the statutory covenant to the holders of obligations issued by the Authority after May 10, 1973.

In April 1974, the United States Trust Company of New York instituted litigation in New Jersey as Trustee for the 40th and 41st Series of the Authority's Consolidated Bonds, as the holder of a significant amount of outstanding obligations of the Authority, and as a class representative on behalf of the holders of all outstanding bonds of the Authority against the State of New Jersey and its Governor and Attorney General seeking a declaratory judgment that the action taken by the States in 1974 to repeal the 1962 statutory covenant violates the federal and state Constitutions. This action has been consolidated with another pending action in New Jersey which was instituted by private parties seeking to invalidate the statutory covenant. The actions in New Jersey are proceeding while similar actions instituted and pending in New York relating to the covenant and its repeal have not been progressed."

• • •

Exhibit C-5

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

INVESTMENTS & REVENUES

Based on the same assumptions used in a similar compilation submitted as of 12/31/60 to Senator Frank S. Farley, Chairman, New Jersey Senate Committee Created to Investigate the Port Authority of New York and New Jersey

(000 Omitted)

Facility	Total Investment As of 12/31/73	Net Revenues Year 1973	Net Revenues Cumulative Amount	Net Revenues Cumulative Yrs. in Svc.	Years in Deficit Oper.
JFK Intnl. Airport	$ 663,729	$18,347	$171,089	27	7
LaGuardia Airport	178,473	6,740	22,393	27	13
Newark Intnl. Airport	347,532	(1,818)	(5,749)	26	18
Teterboro Airport	11,369	(232)	(9,272)	25	25
Heliports	721	(442)	(3,664)	20	20
Grain Terminals, Grain Elevators, & Columbia St. Pier	4,309	(110)	793	28	10
Port Newark	149,875	(1,205)	11,722	26	5
Erie Basin Piers	12,805	(708)	4,838	16	2
Hoboken Piers	18,113	(256)	3,792	21	6
Brooklyn Piers	95,944	(2,536)	(7,180)	18	15
Elizabeth	190,781	2,149	12,748	12	1
N.Y.C. Pass. Ship Term.	1,299	(604)	(744)	2	2
PA Building	—0—	765	16,290	41	21
N.Y. Truck Terminal	9,945	(262)	(9,940)	24	24
Newark Truck Terminal	8,225	(378)	(7,002)	24	23
P.A. Bus Terminal	60,618	(51)	5,386	24	14
Holland Tunnel	69,339	111	118,359	43	1
Lincoln Tunnel	199,325	(1,607)	5,458	37	20
Geo. Washington Bridge	213,469	17,431	267,000	43	8
Staten Island Bridges	65,606	6,341	48,585	46	22
PATH Corp.	221,026	(28,360)	(153,073)	12	12
World Trade Center	750,410	(16,460)	(36,058)	4	4
Total	$3,272,913	$(3,145)	$455,771		

NOTE: Parentheses denote deficits.

Exhibit C-15

FROM THE OFFICE OF THE GOVERNOR

FEBRUARY 10, 1975

FOR IMMEDIATE RELEASE

FOR FURTHER INFORMATION
HERB WOLFE
MORAY EPSTEIN—X7212

Governor Brendan Byrne Monday reiterated his directive to the Port Authority of New York and New Jersey and the Department of Transportation to proceed with the proposal to extend Port Authority Trans-Hudson (PATH) service from Newark to Plainfield.

The Governor issued his instructions after reviewing reports from the Transportation Department and a Joint Task Force of staff of the Port Authority and the Transportation Department.

The reports considered the benefits and costs of improving mass transit service in the Newark-Plainfield corridor either by improving existing operations of the Central Railroad of New Jersey (CNJ) or by extending PATH service from Newark. The possibility of using part of the CNJ right of way for a roadway exclusively for buses was also considered.

The major issue to be resolved between the Department of Transportation and the Port of New York and New Jersey Authority is the financing of the local share of $69.4 million necessary to match the Federal fund application.

In its report, the Joint Task Force estimated that about $278 million in Federal assistance is needed for the PATH project, representing 80 percent of the estimated $347 million total project cost.

Exhibit C-15

This compares to $201.5 million requested in April 1974 by PATH in an application to the Urban Mass Transportation Administration (UMTA) for Federal aid on the basis of total project cost then estimated at $252 million. The cost difference largely is attributed to inflation.

The Governor said, "the economic analysis submitted by the task force indicates that the initial capital expenditure for a PATH extension will be much higher than the initial capital expenditure for simply upgrading and improving the CNJ.

"On the other hand, the analysis also shows that the cost per trip results in an operating cost which is much more favorable for the PATH Extension proposal than for improvement of CNJ service," the Governor pointed out.

"Our operating subsidy program," the Governor continued, "will reach the $72 million level this fiscal year. Minimizing this drain on State and Federal resources is a matter of high priority."

He described the PATH project as "an example where an investment in capital improvements can result in more efficient and less costly operations and maintenance."

Byrne pointed out that the PATH project conforms to his "long standing commitment to insure that the Port Authority of New York and New Jersey fulfills its obligation to provide mass transit facilities for New Jersey by using its own resources to fund public transportation.

He said repeal of the covenant restricting the Port Authority's involvement in public transportation had made the Port Authority "capable of fulfilling its original mandate — to plan and develop a transportation system which contributes to the economic well being of the port district."

"The need for the Port Authority, with its considerable wealth, to contribute to the creation and operation of a

Exhibit C-15

public transportation system and to the reduction of problems stemming from energy shortages and air pollution has long been apparent," said the Governor. He also indicated that the PATH project was only one aspect of the commitment to public transportation which he would expect of the Port Authority.

The Joint Task Force report, which Byrne said "clearly shows the expensive and complex nature of any major rail project in this corridor", stems from a series of meetings in August and September 1974. Those meetings resulted in a request by UMTA for the Port Authority and the Transportation Department to re-evaluate the PATH Extension proposal.

The Governor previously instructed Port Authority and Transportation Department officials to proceed with the PATH project in a meeting last January 15, as the Joint Task Force report was nearing completion.

The Governor also referred to a letter from Transportation Commissioner Alan Sagner replying to UMTA's request. The letter indicated that from a narrow and immediate budgetary perspective, simple upgrading of the existing CNJ commuter service is "cheaper."

However, it notes that, "from the viewpoint of a broader economic analysis, the extension of PATH to Plainfield has other advantages," such as:

— The service will provide a link among five of New Jersey's principal center cities—Newark, Jersey City, Elizabeth, Hoboken and Plainfield—in a manner consistent with the State's policy to sustain and redevelop the State's older cities.

— The PATH project provides for access to Newark Airport.

Exhibit C-15

— The PATH Extension will essentially for the first time provide *intra*state rapid transit service in New Jersey in a highly developed urban corridor at a time when added transit capacity is made increasingly essential by fuel shortages.

The Governor stated that while it was difficult to assign dollars and cents values to these advantages, they "represent the very factors which do and should differentiate a public sector investment decision from one made by the private sector."

The Task Force was co-chaired by Manuel Carballo, Deputy Commissioner of the Department of Transportation, and Louis J. Gambaccini, Director of Rail Transportation of the Port Authority. Staff members of both agencies carried out the technical work.

The request for re-evaluation by UMTA was based on three principal factors:

— The possibilities of purchase of CNJ right of way by the State, thus opening the question of whether an upgrading of CNJ commuter service represented a viable alternative;

— The desire on the part of UMTA to examine the most cost-effective solution in this corridor; and

— The relationship of any alternative in this corridor to the State's total mass transportation program from the point of view of relative priorities of major new transit programs.

The primary mission of the Task Force was to identify the various alternative plans and compare them on the basis of economic and non-economic criteria. Due to sharp

Exhibit C-15

escalation of construction costs and overall inflation, the economics of all alternatives were re-evaluated to reflect present and projected capital costs and future operating results. Selected non-economic factors which were compared and evaluated included service frequency, convenience and comfort, travel time and environmental impact.

As a result of this intensive review of the range of alternatives, five plans were finally selected by the Task Force for detailed consideration. They are:

1. PATH Extension to Plainfield via Newark Airport and Elizabeth. (Proposed in UMTA application April 1974)
2. CNJ expanded and modernized diesel service from Newark to Plainfield via Aldene.
3. CNJ electrification from Newark to Plainfield via Aldene. (Proposed in Transportation Department's 1968 Master Plan.)
4. CNJ diesel service on the mainline via Aldene with minimal upgrading to assure continued, reliable and safe rail service.
5. Development of a Busway on the two northerly tracks of the CNJ from Elizabeth to Plainfield with access provided to the Busway at both ends by local streets and major highways.

Under each alternate, the Task Force investigated the capital costs, operating costs, potential funding and operating and service factors involved to include a commuter service to both Plainfield and Raritan.

The Task Force also reconsidered the basic question of the need for rail access to Newark International Airport,

Exhibit C-15

a prime feature of the PATH Extension alternative.

The two CNJ rail alternatives, diesel and electrification, would not themselves provide a rail access to the airport, since both plans would utilize the existing CNJ alignment (north and west of the airport) via the Lehigh Valley Aldene route to serve the Plainfield Corridor. In that case, an express bus service could be provided between the two railroad stations in Newark and the airport. The CNJ Busway alternative would provide a bus service to the airport.

In the course of the Task Force studies, a detailed analysis was made of present traffic volumes and distribution of passengers utilizing the airport and future projections of airport passage.

Several rail alternative services to and from Newark Airport which had been studied in past years were re-examined to obtain an updated picture of the capital cost and other factors involved in providing such services. The study concluded that an interim express bus service to Newark's Penn Central and Erie-Lackawanna Stations is the most prudent investment at this time, under current economic circumstances.

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Attachments: Joint Task Force Report
Letter to UMTA from Commissioner Sagner

Excerpt from Exhibit C-17

REVISION OF TOLL RATE SCHEDULE FOR VEHICULAR CROSSINGS

It was recalled that the Board, at its meeting on April 10, 1975 (appearing at pages 112 et seq. of the Official Minutes of that date), adopted an amendment to the resolution establishing tolls for the use of vehicular crossings.

After reviewing the Commissioners' April 10th modification of the toll rate schedule for vehicular crossings, the Governors met on April 18, 1975. As a result of communications with the Governors following that meeting, the Board has reconsidered its April 10th resolution and agreed upon amendments thereto authorizing the issuance of reduced rate passenger car 20-trip, 30-day ticket books to be sold for $20.00 and adjusting the tolls charged trucks to provide for a uniform increase of 50%. It is believed that these changes adhere to the basic policy of discouraging avoidable automobile usage and still producing additional revenues to facilitate the new mass transportation capital projects described in the April 10th resolution.

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Exhibit C-18

NEWS FROM
THE PORT AUTHORITY OF NY AND NJ
One World Trade Center, New York, N.Y. 10048

PUBLIC AFFAIRS DEPARTMENT
JOHN TILLMAN, DIRECTOR
FOR INFORMATION:
(212) 466-7777
(201) 622-6600 Ext. 7777

FOR IMMEDIATE RELEASE
April 10, 1975

New York, Apr. 10—To increase its ability to finance vital mass transit improvements, the Port Authority will increase tolls by 50 per cent for all vehicles except buses at its six tunnels and bridges, and eliminate the sale of passenger car reduced rate tickets. The changes will go into effect on May 5.

At the same time, as an incentive to the formation of carpools where public transit is not reasonably available, the Port Authority will institute a 66⅔ per cent discount from the new rate for passenger automobiles occupied by three or more persons.

The new cash fare for automobiles will be $1.50 per round trip. The new carpool rate will be $.50 per round trip.

To further encourage the use of mass transportation, the existing bus round trip rate of $1.80 will remain unchanged.

Truck rates will be increased by approximately 50 per cent.

The new toll adjustments will apply at the George Washington Bridge, the Lincoln and Holland Tunnels, the Bayonne and Goethals Bridges, and Outerbridge Crossing.

Exhibit C-18

Announcement of the Port Authority's actions was made today by Chairman Willian J. Ronan, following a meeting of the Board of Commissioners.

Dr. Ronan said the new tolls schedules were further evidence of the Port Authority's deep commitment to mass transit. It is estimated that they will bring in $39 million in additional revenues annually. These funds are expected to be applied to the expansion of the Port Authority Bus Terminal; the extension of PATH to Plainfield via Newark International Airport; the rail access between Kennedy International Airport and Penn Station, Manhattan using Long Island Railroad tracks and high speed MTA cars; and direct rail service from New Jersey into Penn Station, Manhattan for certain trains on the Erie Lackawanna Railway.

The new toll structure is in line with efforts to reduce inefficient and unnecessary automobile usage, highway congestion, air pollution, and to conserve fuel.

It is no longer in the public interest to offer special inducements to motorists who choose to drive to work. On the contrary, there is general agreement on all levels of government that commuters should be encouraged to make maximum use of public transportation or to form carpools where public transit is not reasonably available.

A book of 60 carpool tickets will be valid for six months in addition to the month purchased. The book will be sold for $30, thereby providing a 66⅔ per cent discount from the $1.50 cash toll for automobiles. The carpool reduced rate tickets will be valid for use between 10 P.M. Sunday and 2 A.M. the following Saturday, except certain holidays, and are transferable between vehicles.

Passenger car reduced rate ticket books now outstanding —the 30-day, 20-trip books which sell for $10.00, and the

Exhibit C-18

two-year, 12-trip books, which sell for $9.60—will remain valid until the expiration date shown in the book.

The present automobile cash toll of $1.00 per round trip has been constant since each of the vehicular crossings was first opened to traffic, starting with the Holland Tunnel in 1927. The Port Authority has made available books of reduced rate automobile toll tickets for regular users of these crossings since 1950.

Excerpt from Exhibit C-19

[LETTERHEAD OF]
U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

April 25, 1975

REGISTERED—RETURN RECEIPT REQUESTED

Port Authority of New York and New Jersey
One World Trade Center
New York, New York 10048

Gentlemen:

Enclosed are copies of two complaints filed with the Federal Highway Administrator by the Honorable Peter A. Peyser, Member of Congress, and by Mr. Stanley D. Ver Nooy, respectively, alleging that certain proposed increases in the tolls to be charged for transit over the George Washington Bridge, the Bayonne Bridge, the Goethals Bridge, and the Outerbridge Crossing, are unjust and unreasonable within the meaning of section 4 of the Bridge Act of 1906, 33 U.S.C. 494.

These copies of the complaints are sent to you pursuant to the Bridge Toll Procedural Rules, 49 CFR Part 310, a copy of which is enclosed for your convenience. Your attention is invited particularly to § 310.4, requiring a written response within 30 days, and enumerating nine points of information the response should contain.

Upon receipt of your response, or on the expiration of the 30-day response period, the Federal Highway Administrator intends to conduct an investigation as provided in § 310.5. In order to conduct an investigation of the requisite breadth and thoroughness, where four bridges are concerned, it seems necessary to perform it in two stages.

Excerpt from Exhibit C-19

The first, or overview, stage is now contemplated as covering the underlying law authorizing the construction or acquisition of the four bridges, and the charging of tolls thereon. It should also cover the position of the four bridges in your organizational and financial structure, the rights of bondholders, capital investment, and historical rates of depreciation and return on capital, as a minimum.

The second, or audit, stage would cover in detail, on a bridge-by-bridge basis, not only the matters disclosed by the overview stage but specific items of maintenance, operation, improvement, depreciation, revenues, and diversion, if any.

So that the investigation may begin the overview stage promptly, it is requested that you furnish, together with your formal § 310.4 response, a statement of how soon the overview team might visit your offices, and with whom they would meet, to develop the desired information.

Sincerely yours,

DAVID E. WELLS
Chief Counsel

Excerpt from Exhibit C-19

[LETTERHEAD OF THE]

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES

April 16, 1975

The Honorable Norbert T. Tiemann, Administrator
Federal Highway Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Mr. Tiemann:

Last week the Port Authority of New York and New Jersey ordered a 50% increase in the toll rate for the bridges and tunnels under its jurisdiction. I believe that these increases are unjust and unreasonable.

Therefore, I am requesting you to exercise the authority vested in you, as Administrator of the Federal Highway Administration, pursuant to the Bridge Act of 1906, as amended (33 U.S.C. 494), to determine that such tolls are unreasonable and unjust, to prescribe what rates may be reasonable and just under the circumstances, and to order a compensatory repayment of any unjust rates which may be paid if the higher rates go into effect in the interim.

The full text of the complaint is attached.

Sincerely,

PETER A. PEYSER
Member of Congress

PAP:W:cj
Enclosure

Excerpt from Exhibit C-19

This complaint is brought pursuant to Title 49, C.F.R., Part 310.

I. Complainant is Peter A. Peyser, U.S. Representative from the twenty-third Congressional District in New York State. His district encompasses much of Westchester County and part of New York City. Many of his constituents, in addition to himself and his family, regularly use the bridges and tunnels of New York City, which will be subject to the proposed rate increase, and they will suffer an unjust and unreasonable financial hardship if this toll scheduled is approved:

II. The bridges affected are the George Washington Bridge, the Bayonne Bridge, the Goethals Bridge, and the Outerbridge Crossing. The George Washington Bridge is located at West 178th Street, crossing the Hudson River to Fort Lee, New Jersey; the Bayonne Bridge extends from Bayonne, N.J., crossing Kill Van Kull to Port Richmond, Staten Island; the Goethals Bridge extends from Elizabeth, N.J., crossing Arthur Kill to Holland Hook, Staten Island, and the Outerbridge Crossing extends from Perth Amboy, N.J., to Tottenville, Staten Island, New York.

III. The agency responsible for establishing and collecting the tolls is the Port Authority of New York and New Jersey, located at 1 World Trade Center, New York, New York 10048.

IV. The rates alleged to be unjust are as follows:

— $1.50 for passenger cars, which represents a 50% increase from the normal rate;

— $.75 for motorcycles, which also represents a 50% increase from the normal rate.

Excerpt from Exhibit C-19

V. Complainant believes that the rates are unreasonable and unjust for the following reasons:

1. The rate increase ordered by the Port Authority is in excess of that necessary to conduct its operations and to assure a fair and reasonable return on capital invested in the Port Authority operations. The 1974 annual report indicated that last year the operating revenues of the Port Authority rose to $156,116,000, a $19,000,000 increase over 1973, despite decreased use of the bridges and tunnels.

2. The rate increase will not result in a shift to mass transit.

(a) During the gasoline shortage last winter, it became acutely obvious that the great majority of those who do drive in passenger cars do so because there is no mass transit available to them, and those who do not car pool do not because car pooling is very impracticable, and in many cases is impossible. While there is no question that car pooling should be encouraged, this rate increase will not have the desired impact.

(b) The municipal governments in the metropolitan area have taken no action which would indicate that the area is sufficiently capable of affording adequate mass transportation for those who, because of the proposed rate increase, would be forced to utilize mass transportation. Again, there is no question that mass transportation should be encouraged and emphasis should be placed upon developing an adequate mass transportation network in the area. However, the

Excerpt from Exhibit C-19

proposed increase would not be that emphasis, but instead would be a form of regressive taxation.

(c) The municipal governments in the metropolitan area have taken no action to facilitate car pooling arrangements, in order to make car pooling workable and feasible. In the absence of such actions, it is unreasonable and unjust to impose financial hardship upon those who have no alternative but the private automobile for commuter transportation.

(d) The rate change will have sufficient adverse impact upon Northern Westchester County, which does not have sufficient mass transportation facilities. If the rate increase of the Port Authority is approved, it is certain that the New York State Thruway Authority will raise the toll on the Tappan Zee Bridge between Westchester and Rockland Counties $.50 to make it uniform with the toll on the George Washington Bridge. This will cause severe economic detriment to this area, and cannot result in a significant switch to mass transportation because there is no adequate system of mass transportation in the area.

(3) Commuters cannot afford a 50% increase in the cost of transportation.

The United States is currently in the midst of the deepest economic slump it has experienced since the Great Depression. Currently, the unemployment rate is 8.7%, meaning that 8,000,000 people are out of work. Inflation, although not as severe as last year, is currently running at an

Excerpt from Exhibit C-19

annual level of between 7% and 8%. Thus, the commuting worker is facing the worst economic picture that he has experienced in over 40 years.

The New York Metropolitan Area has been severly hit by this combination of recession and inflation. Workers in this area have seen their real incomes drop approximately 4% in the last year. A 50% increase in tolls for a daily commuter would be an added $125 cost annually for the average commuter, which would virtually eliminate the impact that the recently approved tax rebate would have.

(4) The impact of this will be severest on those who can least afford it.

The gasoline shortgage last winter made it very clear that those who could not car pool and who could not utilize mass transportation were low and middle income commuting workers. These workers do not have viable transportation alternatives, and do not have the economic leverage to sustain the 50% toll increase.

(5) The increase is inflationary.

The rate increase of $.50 is a 50% increase in a major budgetary item for many New York and New Jersey workers. Clearly this can only serve to fuel inflation and thwart real economic recovery in the area.

(6) The increase will drive business away from the New York Metropolitan Area.

Excerpt from Exhibit C-19

Businesses, already facing a depressed economy, will view this increase as a further incentive to move away from this area. Their workers will demand to be compensated for this cost of living increase. Those that cannot compensate their workers will face the loss of trained workers, or increased worker dissatisfaction over a situation beyond the control of management. Given the current economy, this can only be an incentive to move away from the area.

VI. Complainant has taken no prior action to obtain a change in the rates of toll alleged to be unreasonable and unjust, because no opportunities exist outside of the Federal Highway Administration for a hearing on this issue, and the probability that the Governor of either State will veto this rate hike is remote.

VII. The complainant prays that the Administrator determine that such tolls are unreasonable and unjust and disallow the increase; that the Administrator, if necessary, initiate formal adjudication to determine if any increase would be reasonable under the circumstances, and if a lesser increase would be reasonable, then to prescribe such a lesser increase; that in the event that the increase is determined unreasonable and unjust, the Administrator order a rollback of the increase, and that such rollback be compensatory; and the complainant prays for such other and further relief as the Administrator may deem just and proper.

PETER A. PEYSER

Excerpt from Exhibit C-19

April 15, 1975

Mr. Norbert T. Tiemann
Federal Highway Administrator
400 Seventh St., S.W.
Washington, D.C. 20591

Subject: Complaint against proposed highway bridge/tunnel tolls (interstate) by Port Authority of New York and New Jersey, effective May 5, 1975.

Dear Mr. Tiemann:

As provided in 49 CPR Part 310, as amended in the FEDERAL REGISTER of April 3, 1975, a complaint is hereby lodged by the undersigned private citizen against the subject proposed increase in interstate bridge/tunnel tolls.

(1) The nature of my interest in the reasonableness and justness of the toll schedules is that I am forced to use these facilities every working day to get to and from work. There are no alternative facilities, including mass transit facilities, available between my home in Bogota, N.J. and my office at Kennedy International Airport, Jamaica, N. Y., other than a combination of 6 subway trains and 4 buses (round trip) which would require a minimum of 4 to 5 hours' travel daily.

(2) Name and location of bridge/tunnel: George Washington Bridge, between Fort Lee, N.J. and New York, N.Y., Lincoln Tunnel, between Weehawken, N.J., and New York City; Goethals Bridge, between Bayonne, N.J. and Staten Island, N.Y.

(3) Name of agency responsible for tolls: Port Authority of New York and New Jersey, 1 World Trade Center, New York, N.Y. 10048.

Excerpt from Exhibit C-19

(4) Rates of tolls which are unreasonable and unjust:

Passenger cars: $1.50 per round trip, for vehicle with 1 or 2 occupants.
$0.50 per round trip, for vehicle with 3 or more occupants.

(5) Reasons for belief that the tolls are unjust and unreasonable:

a. They represent the following percentage increases over comparable tolls in effect today:

(i): Regular basic toll: 50%.

(ii): Toll applicable to computer traffic with 1 or 2 persons in car: 200%.

(iii): Toll applicable to vehicles making not more than 12 crossings in a period from 2 years and 1 day to 2 years and 364 days: 87.5%.

b. To the best of my knowledge and belief, the Authority has never made full public disclosure of the shares of its assets, liabilities, revenues and expenses allocated among its various facilities, including those at issue in this matter, so that no publicly available bases are available to make determination whether these tolls, and related return on investment, are fair and reasonable.

c. There has been no submission of economic data or information in support of these new rates.

d. There has been no submission of estimates of the cost of providing service via these facilities, with supporting details and references to sources.

e. There has been no detailed explanation of the basis for estimates of the aggregate effect of the new rates on the Authority's revenues and traffic volume.

Excerpt from Exhibit C-19

f. There is no undertaking on the part of the Authority that the additional revenues will be applied to the improvement of these facilities. Indeed, the Authority has stated that the additional revenues will be used for improvement of other facilities; not the facilities being used as a base for the additional revenues. Furthermore, there is no assurance that the additional funds will not be used to underwrite the losses known to be currently incurred by the operation of the Authority's World Trade Center—an enterprise entirely unrelated to the operation of these bridges and tunnels, and of no concern to those using these facilities.

(6) In light of the foregoing, relief from the imposition of the above tolls is urgently sought, and that the following toll structure for passenger automobiles be substituted:

a. 50¢ round trip for commuters' cars, with no minimum occupancy requirement; 20-trip books freely transferable from one holder to another, and an expiration date of 20 days from date of issue.

b. 75¢ round trip for casual users; 20-trip books freely transferable from one holder to another, and an expiration date of December 31 of the second year following date of issue.

c. $1.00 round trip for other users.

A copy of your transmission of the above to the Authority under 310.4 will be appreciated, as well as a copy of their response.

Cordially,

STANLEY D. VER NOOY

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Excerpt from Exhibit C-20

MODIFICATION OF TOLL RATE SCHEDULE
FOR VEHICULAR CROSSINGS

It was reported to the Board that the automobile cash toll of $1 per round trip has been constant since each of the vehicular crossings was first opened to traffic, starting with the Holland Tunnel in 1927. Since 1950, motorists making frequent use of crossings have been able to purchase books of passenger automobile reduced rate tickets. One book provides 20 tickets good for 35 days at 50% discount from the $1 cash toll, and the other provides 12 tickets, good for two years, at a 20% discount. Such reduced rates were instituted at a time when there was unused capacity at Port Authority crossings and toll revenues were rising steadily. However, in recent years toll revenues from Port Authority crossings have not kept pace with the rising costs of capital improvements and operating expenses with the result that the existing toll structure no longer provides adequate revenues to the Port Authority. Furthermore, additional revenues guaranteed by toll adjustments will facilitate the Port Authority's ability to continue to operate and to improve the present PATH system, the Port Authority Bus Terminal and to proceed with its required expansion by 50% of its present capacity and to continue its work on the effectuation of the extension of PATH to Plainfield, New Jersey, the Kennedy International Airport rail service project and the project for providing additional direct rail service to Penn Station, New York for New Jersey commuters. It should be noted as well that the PATH deficit has risen from $5 million annually to $33 million annually in 1974. It is necessary for the Authority as a self-supporting agency, particularly since its role in mass transportation has been expanding,

Excerpt from Exhibit C-20

to adjust the toll structure so as to continue its ability to maintain and finance its facilities and to maintain the sound financial standing of the Authority and its obligations.

Furthermore, in recent years, Federal, state and local governments have sought to reduce inefficient and unnecessary automobile usage because of concerns over highway congestion, deteriorating public transit facilities, air pollution, and most recently, the need to conserve fuel. To this end, public agencies, including the Port Authority, are underwriting substantial subsidies to foster public transportation. It is no longer in the public interest to offer special inducements to individual motorists who choose to drive to work. There is general agreement on all levels of government that commuters should be encouraged to make maximum use of public transportation or to form carpools where public transit is not reasonably available. There is also general agreement in light of energy and environmental considerations to discourage avoidable automobile usage. At the same time the continued operation and development of mass transportation facilities is universally recognized as a key component of programs to ameliorate environmental and energy concerns.

To further encourage the use of mass transportation facilities there would be no increase in bus tolls.

In light of the foregoing, it was recommended that, effective May 5, 1975, passenger automobile tolls be increased by 50% and the sale of existing 50% and 20% reduced rate ticket books be discontinued. Nevertheless, reduced rate ticket books outstanding as of that date would continue to be honored until their expiration dates. It was further recommended that the classification of trucks be modified and the toll schedule applicable thereto be increased. It was also recommended that, effective May 5, 1975, a new

Excerpt from Exhibit C-20

reduced rate toll for carpools, available through the purchase of books of tickets, be instituted for passenger automobiles occupied by three or more persons providing a 66⅔% discount from the $1.50 automobile cash toll. To discourage purchase of tickets for the occasional leisure-oriented crossing and promote purchase for the frequent commute-to-work crossing, the carpool ticket book costing $30 will contain 60 tickets valid only for six months in addition to the month of purchase. The valid period will run from 10:00 p.m. on Sunday to 2:00 a.m. on Saturday which will also accommodate carpoolers on late night shifts. However, the carpool tickets will not be valid between 2:00 a.m. and 10:00 p.m. on the following six holidays: New Year's Day, Memorial Day, July Fourth, Labor Day, Thanksgiving and Christmas, provided such holidays do not fall on a Monday or Friday. If the holiday immediately precedes or follows a Saturday-Sunday weekend, the ticket would not be valid from 2:00 a.m. on the first day of the combined holiday and weekend period until 10:00 p.m. on the last day of the period. The purchase of scrip at 10% discount, including truck scrip, will be continued under the new schedule.

The increase in the passenger automobile and truck tolls and the discontinuance of existing 50% and 20% discounts and provision of the reduced rate for carpools is estimated to produce an increase in revenues of approximately $39 million annually.

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Supreme Court of New Jersey

State's Supplemental Exhibits

ADMITTED INTO EVIDENCE
BY ORDER DATED
SEPTEMBER 2, 1975

State's Supplemental Exhibit A

BARR BROTHERS REPORT
(May or June 1975)

THE REPORTS OF MY DEATH ARE GREATLY EXAGGERATED
(With apologies to Mark Twain)

With the recent court decision concerning deeper involvement of the PORT OF NEW YORK AND NEW JERSEY AUTHORITY in Mass Transit, we thought that it might be appropriate to set some facts straight regarding the basic strengths of the Authority.

(1) Section 3 of the basic bond resolution requires that for a bond issue to be sold the prior year's earnings must equal 1.30 x maximum future debt service (including mandatory sinking fund requirements).

(2) Under Section 7 the Port Authority must certify that bonds issued for any additional facility will not "materially impair the sound credit standing of the Authority".

(3) While not required under the basic bond resolution, the Authority policy has been to maintain reserves equal to the next two years debt service.

(4) The General Reserve Fund is required to be maintained at 10% of outstanding bonded debt. At December

State's Supplemental Exhibit A

31, 1974, it stood at $173,487,000., the Consolidated Reserve Fund $46,800,000., and reserve funds in trust totaled $34,770,000., which together was more than the next two years debt service.

(5) At December 31, 1974

Total Assets of $3,912,295,000. included $3,477,000,000. in facilities, $262,877,000. in securities (mainly U.S. Treasury and U.S. Agency paper) and $90,812,000. in cash and time deposits.

Gross operating revenues were $410,000,000. with net available for debt service and reserves of $179,200,000.

Whether or not the Port Authority ever gets involved in Mass Transit, we feel it continues to be one of the finest revenue credits in the country, amply protected by the basic bond resolution, excellent management and some highly profitable and monopolistic facilities that can more than carry a reasonable amount of Mass Transit, particularly with the recent toll increases on the Hudson crossings providing additional revenues.

At these depressed levels, we feel these offerings present an outstanding and secure value for the investor.

Moody's Rating	S&P	Issue	Cpn.	Mat.	Price	Yield	Current Yield	Average Life Thru Operation Of The Mandatory Sinking Fund	Yield To Average Life
A	A	Port of New York & New Jersey Authority,	3.40	2/1/87	64	8.25	5.31	1983	10.287
A	A	Port of New York & New Jersey Authority,	3 1/4	4/1/93	52 1/4	8.50	6.24	1987	10.323
A	A	Port of New York & New Jersey Authority,	3 3/8	5/1/94	52 1/4	8.50	6.48	1988	10.05
A	A	Port of New York & New Jersey Authority,	3 1/2	6/1/96	51 1/2	8.50	6.80	1990	9.70
A	A	Port of New York & New Jersey Authority,	4	3/1/02	56	8.00	7.14	1993	9.00
A	A	Port of New York & New Jersey Authority,	6 5/8	8/1/05	83	8.14	7.98	1998	8.05
A	A	Port of New York & New Jersey Authority,	5.80	2/1/07	76	7.86	7.63	2000	8.05
A	A	Port of New York & New Jersey Authority,	5 1/2	10/1/08	72 1/2	7.83	7.58	2001	8.02

BARR BROTHERS & CO., INC.

State's Supplemental Exhibit B

DOCUMENTS RE REPEAL, PATH FARE INCREASE, ENERGY CRISIS, ETC.

(February 1974)

THE STAR-LEDGER

STAR-LEDGER PLAZA, NEWARK, N.J. 07101

Wednesday, February 13, 1974

BYRNE ASKS ICC DENIAL OF PATH FARE INCREASE

Gov. Brendan T. Byrne said yesterday deficits on the PATH rail line could be paid by the Port Authority of New York and New Jersey without a 20-cent fare increase being pushed on commuters by an "unveiled form of blackmail."

Byrne urged the Interstate Commerce Commission (ICC) to deny a petition by the P.A. for an increase of the present 30-cent fare to offset an anticipated $19.7 million operating deficit on the commuter line.

"The figures available to us at this time indicate that even after absorbing the projected loss of PATH, the Port Authority maintains sufficient surplus" to cover the bonds it has issued to finance its facilities, the Governor said in a statement.

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Alan Sagner, state transportation commissioner, read the statement in the second day of ICC hearings in Jersey City on the proposed fare increase on the 145,000 commuter PATH (Port Authority Trans-Hudson) rail line from Manhattan to northern New Jersey.

Sagner said the "implied threat" to abandon plans for a PATH extension to Plainfield, mandated by the Legisla-

State's Supplemental Exhibit B

tures of both states is "based on specious reasoning and appears to be an unveiled form of blackmail."

P.A. officials have said that a failure of the ICC to approve the fare increase could lead to abandonment of plans to extend PATH service to Plainfield via Newark International Airport.

Sagner said "in view of the present energy crisis," no action should be taken which would encourage commuters to switch to private transport from public facilities.

The P.A. had originally predicted it would lose 7½ per cent of the passengers on the PATH line due to the fare hike, but later revised the figure to 2 per cent.

Francis A. Mulhern, attorney for the Port Authority, said the commissioners of the bistate agency will consider Sagner's petition at their regular monthly meeting tomorrow.

Sagner said Byrne believes that the operation of the PATH line cannot be separated from running other Port Authority facilities, such as the Hudson River tunnels, three metropolitan airports, containerports and office buildings.

The fare increase has been postponed following protests of community leaders and politicians.

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THE NEW YORK TIMES
WEDNESDAY, FEBRUARY 13, 1974

BYRNE ASSAILS BID FOR 50C PATH FARE

Port Agency, Under Attack, Agrees to Reconsider Its Request for Increase

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SPECIAL TO THE NEW YORK TIMES

JERSEY CITY, Feb. 12—Under sharp attack by Governor Byrne, commissioners of the Port Authority of New York and New Jersey agreed today to consider on Thursday whether to withdraw a request for an increase in PATH tube train fares from 30 to 50 cents.

Intervening in the Interstate Commerce Commission hearings here on the proposed fare increase, the Byrne administration denounced it as an "ill-timed request."

Alan Sagner, the State Transportation Commissioner, appeared for the Governor to deliver one of the sharpest rebukes in memory by a state administration against the bi-state authority.

He said that if the commissioners did not withdraw their petition the state would urge the I.C.C. administrative judge in charge of the hearings, Richard McG. Wilkins, to deny it.

In a statement read at the hearing, Mr. Sagner said that Port Authority actions had indicated "a failure to embrace its responsibility to transportation as a part of its mandate for the economical viability of the port area."

Wilson Critical

Governor Wilson of New York, in a brief comment in Albany, said that it would be "injudicious" to raise the

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fare on the trans-Hudson tube lines above the 35-cent level of the New York City subways.

Each Governor has veto power over actions of the 12 Port Authority commissioners.

On learning of Governor Byrne's toughly worded intervention, one of the commissioners, Jerry Finkelstein of New York, commented: "That certainly lays it low."

Mr. Finkelstein favors a 35-cent PATH fare.

Kenneth S. Levy, deputy attorney general, represented the state in its formal intervention in the proceedings today. Francis A. Mulhern, the port agency's deputy general counsel, then asked for and got permission from Judge Wilkins to continue the hearings today and tomorrow at Jersey City and Thursday and Friday at Newark or until the commissioners have had time to review the Governor's statement at their Thursday meeting.

Commissioner Sagner detailed the following reasons why his department opposed a fare increase.

No action should be taken during the energy crisis to divert traffic from public transportation.

The argument of a deficit in PATH operations ignores the surpluses in other Port Authority operations that could make up the loss.

There may be help from Washington.

The Port Authority's "implied threat" to abandon plans for the PATH extension from Newark to Plainfield is "an unveiled form of blackmail."

PATH carries about 135,000 riders daily between Manhattan and Newark, Jersey City, Hoboken and Harrison, N.J.

State's Supplemental Exhibit B

DAILY NEWS

THURSDAY, FEBRUARY 14, 1974

KHEEL RAILS AT PATH, ASKS RESIGNATIONS

BY DAVID HARDY

Opposition to the 20-cent fare hike proposed by the Port Authority Trans Hudson (PATH) heated up even more yesterday as New York lawyer Theodore (Ted) Kheel, a long-time critic of the bistate agency, called for the resignation of the authority commissioners for "defying the wishes" of New Jersey Gov. Byrne and New York Gov. Wilson.

Byrne and Wilson—both of whom have veto power over the decisions of the commissioners—have already expressed strong opposition to the proposed fare hike from 30 to 50 cents.

"The commissioners, as honorable men, have no choice but to resign," said Kheel in a statement from his Manhattan law office. "If they are honorable men I call on the two governors to ask them to resign."

Andrew C. Axtell, one of three Port Authority commissioners from New Jersey, blasted Kheel's remarks.

"I feel Mr. Kheel talks out of both sides of his mouth. He tells us (the commissioners) one thing and then tells the newspapers something else," Axtell said.

See 27M Deficit

Axtell said he is still firmly in favor of the fare hike which the PA has stated is necessary to meet an estimated $27.4 million operating deficit on its rail lines.

State's Supplemental Exhibit B

"I believe we should continue with the hearings," Axtell said, "and let the ICC (Interstate Commerce Commission) decide whether there should be an increase."

Once the ICC renders a decision, Axtell said, the commissioners would meet "to reassess the financial picture and if after that Gov. Byrne is still opposed to the increase, I will abide by his wishes. The governor has the final word."

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THE STAR-LEDGER
STAR-LEDGER PLAZA, NEWARK, N.J. 07101
Friday, February 15, 1974

P.A. CALLS OFF ITS REQUEST FOR A PATH HIKE

BY LEONARD J. FISHER

NEW YORK—The Port Authority of New York and New Jersey yesterday withdrew its request for a fare increase to 50 cents on the Port Authority Trans-Hudson (PATH) commuter train system.

The move came two days after Gov. Brendan T. Byrne voiced strong opposition to the proposed 20-cent increase.

New Jersey Transportation Commissioner, Alan Sagner, who aired Byrne's criticism of the proposal at Tuesday's Interstate Commerce Commission (ICC) hearing in Jersey City, was at yesterday's Port Authority meeting as the 10 commissioners attending the session voted unanimously to withdraw the fare increase request from ICC consideration.

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Two P.A. commissioners did not attend the meeting.

"I'm sure the Governor will be as pleased as I am at this decision," said Sagner. Byrne has promised to appoint Sagner to the Port Authority as soon as there is a vacancy.

State's Supplemental Exhibit B

Philip B. Hofmann, a P.A. commissioner from New Jersey, emphasized that it was at Byrne's request the action was taken. He made that clear after P.A. General Counsel Patrick Falvey read the rescinding resolution to the commissioners.

The resolution Falvey read said the PATH fare increase authorized by the P.A. in June, 1973 should be rescinded because the energy crisis is encouraging, rather than discouraging, riders of mass transit, and also because the governors of both New Jersey and New York had expressed their desires to avoid such an increase.

Hofmann quickly pointed out to Falvey that his one-page resolution could be shorter and more precise.

"Governor Byrne doesn't want it, and the commissioners are following his wishes," declared Hofmann, asserting it took only one sentence to describe what the commissioners did yesterday.

"Governor (Malcolm) Wilson (of New York) has said he thought it would be injudicious to have the fare raised above 35 cents (the New York subway fare)", responded Falvey.

"We didn't hear about that at our (executive session) meeting," Hofmann returned.

Later, when the P.A. meeting was officially over, Hofmann, who along with the other five New Jersey commissioners favored the proposed PATH fare increase, told newsmen:

"The Governor (Byrne) asked us to withdraw it, and he's the boss. It took one-tenth of a second, and I made

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the motion. He's the boss. If that's what he wants, that's what he's entitled to."

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Hofmann added that his position on the proposed fare increase and its connection to the P.A.'s proposed $221 million extension of PATH lines to Newark International Airport and Plainfield had been misunderstood if state officials believe he was threatening to scrap the proposed extension if the fare increase was not approved.

The commissioner said it was not a threat, but merely the fact that he opposes the extension without the fare increase.

Sagner had testified Tuesday in Jersey City before the ICC that "the implied threat to abandon plans for the PATH extension from Newark to Plainfield is based on specious reasoning and it appears to be an unveiled form of blackmail."

"Any position concerning fares on the present PATH facility should have no bearing on the PATH extension," said Sagner.

• • •

On Wednesday, Sen. Harrison A. Williams Jr. (D-N.J.), joined Byrne in opposing the 20-cent fare increase.

The third hearing on the proposed fare increase before the ICC, which must approve any hike, was held in Newark yesterday before the Port Authority withdrew its request.

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A P.A. spokesman said last night's scheduled continuance of the hearing was canceled in the wake of that action.

At the Newark hearing, conducted in the Essex County Courthouse, opponents of the fare increase contended that PATH cannot be divorced from other Port Authority operations, and that the agency is more than able to make up the PATH deficit.

"The economic realities are that the Port Authority is a thriving and healthy organization," said Newark Mayor Kenneth A. Gibson in a statement read by an aide.

Opponents also contended that if the PATH fare went up, not only would the interstate railway lose passengers, but rail and bus feeder lines operated by the Erie Lackawanna Railway, the Central Railroad of New Jersey, Transport of New Jersey and smaller bus companies, would suffer as well, since most PATH riders use several mass transit systems in conjunction with PATH.

Port Authority figures show that last month 120,000 fares were collected on the PATH system. The P.A. had sought a fare increase because of the large deficit in the PATH lines which the authority agreed to take over in 1962 in exchange for never again having to operate another deficit mass transit line in the Metropolitan area.

However, Byrne has said legislation will be introduced in Trenton today to eliminate that blockade to the authority's running mass transit services in North Jersey. He pointed out that most mass transit operations are in the red.

State's Supplemental Exhibit B

A P.A. spokesman said yesterday the PATH deficit for 1974, without a fare increase, had been projected at $27 million. The deficit was slightly more than $20 million in 1972. No figure has been released on last year's deficit. The authority has absorbed $102 million in deficits from 1962 to 1972, the spokesman noted.

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DAILY NEWS
FEBRUARY 15, 1974

PA BOWS TO 2 GOVERNORS, WITHDRAWS FARE-HIKE BID

BY DAVID HARDY

Bowing to pressure from New Jersey Gov. Byrne and New York Gov. Wilson, the Port Authority's 12 commissioners voted yesterday to withdraw their controversial proposal for a 20-cent fare hike on the Port Authority Trans-Hudson (PATH) rail line.

Commission Chairman James C. Kellogg of New Jersey announced the decision to withdraw the proposed fare hike from 30 to 50 cents, citing the current energy crisis as well as the opposition of the governors.

Governors Are Pleased

In a resolution read by PA General Counsel Patrick J. Falvey after their meeting at the PA's World Trade Center headquarters in Manhattan, the commissioners said they were withdrawing the requested increase because "the energy crisis had given impetus to the effort to encourage greater use of public transportation rather than the auto."

The resolution also said the commissioners were reversing themselves because the proposal was not in accord "with the expressed desires of the governors to avoid increasing the fares."

Byrne, in a statement from his Trenton office said "we are pleased that the Port Authority acceded to the wishes of the governors of New York and New Jersey and we anticipate similar cooperation in the future."

The proposed increases—which has been the subject of Interstate Commerce Commission hearings in New Jersey

State's Supplemental Exhibit B

since Monday—has drawn vigorous opposition from many of PATH's estimated 20,000 daily riders as well as from a wide range of environmental and consumer groups.

In recent days, the opposition has reached such a pitch that New York attorney Theodore Kheel, the constant critic of the PA, called for the resignation of the commissioners for "defying the wishes" of the governors of New York and New Jersey.

'Form of Blackmail'

Byrne, who with Wilson has veto power over the decisions of the commissioners had strongly opposed the fare boost and accused the PA of using "an unveiled form of blackmail" by threatening to curb plans for expansion unless the hike was granted.

The commissioners made the request for a fare hike last year, emphasizing that the 67% increase was necessary to meet the 27.4 million operating deficit this year.

He Dampens Extensions

At yesterday's meeting, Commissioner Phillip Hofmann of New Jersey said flatly that the action was being taken "in response to Gov. Byrne." However, Hofmann also said that in view of the commission action, he could not favor going ahead with a $650 million project to construct PATH extensions to Plainfield and to Newark and Kennedy airports.

But New Jersey State Transportation Commissioner Alan Sagner, who was also present at the commission meeting, told newsmen he didn't think the extension was in jeopardy.

Despite the commission action, Kheel, who was reached in Miami, said the commissioners' "total lack of under-

State's Supplemental Exhibit B

standing of the real problems of transportation can justify only one conclusion: They must resign."

FARE ADJUSTMENT—RESCISSION

It was recalled that the Committee on Operations, at its meeting on June 7, 1973, revised the PATH tariff to increase the fare from 30 cents to 50 cents.

The tariff is presently pending before the Interstate Commerce Commission.

In the meantime, the energy crisis has given increased impetus to the efforts to encourage the use of public transportation facilities rather than the private automobile. The Governors of both States have expressed their desire to avoid, to the maximum extent possible, increasing the fares on mass transportation facilities, particularly subway and commuter rail facilities.

There has also emerged federal and local policies designed to discourage commutation by automobile to and from metropolitan business centers.

It does not appear, therefore that at this time an increase in the PATH fare from 30 cents to 50 cents will be in accord with such policies and with the federal, state and local efforts to cope with the energy crisis.

It was therefore recommended that the amendment to the PATH tariff adopted June 7, 1973 be and it is hereby rescinded.

Approved.

Whereupon, the meeting was adjourned.

Vice-President/General Manager

State's Supplemental Exhibit C

PORT AUTHORITY PRESS RELEASE
(April 21, 1975)

NEWS FROM
THE PORT AUTHORITY
OF NY & NJ
One World Trade Center
New York, N. Y. 10048

PUBLIC AFFAIRS DEPARTMENT
John Tillman, Director
For Information:
(212) 466-7777
(201) 622-6600 Ext. 7777

FOR IMMEDIATE RELEASE
April 21, 1975

At a special meeting today, the Board of Commissioners of The Port Authority of New York and New Jersey, in accordance with the agreement reached with Governor Carey of New York and Governor Byrne of New Jersey, revised the recently announced increased tolls schedule for its six tunnels and bridges by continuing commuter tickets for passenger cars, but at double the present rate. The previous toll schedule, by eliminating the commuter tickets, had tripled its rate.

Dr. William J. Ronan, Chairman of the Port Authority, said: "We are pleased that this compromise agreement has been achieved. We appreciate the support of Governor Carey and Governor Byrne in this historic revision of the Port Authority revenues to make possible new mass transit projects:

—The expansion of the midtown Port Authority Bus Terminal;

—The extension of PATH to Plainfield via Newark International Airport;

—The rail access between Kennedy International Airport and Penn Station, Manhattan using Long Island Railroad tracks and high-speed MTA cars; and

—Direct rail service from New Jersey into Penn Station, Manhattan for certain trains on the Erie Lackawanna Railroad.

"The new toll structure, with its encouragement of carpools reflects the general agreement at all levels of government that commuters should be encouraged to make maximum use of public transportation or to form carpools when public transit is not available.

"The minutes of the April 10 meeting have been amended by agreement with the two Governors and the new tolls schedule will become effective May 5."

The revision leaves unchanged the Port Authority's incentive to the formation of carpools. A 66-⅔ per cent discount from the new $1.50 rate will apply to passenger autos carrying three or more passengers, making the carpool rates only $.50 for a round trip. A book of 60 carpool tickets, good for six months, will be sold for $30.00. These carpool tickets will be valid between 10 P.M. Sunday and 2 A.M. the following Saturday, except certain holidays, and are transferable between vehicles.

To encourage the increased use of mass transportation, the existing bus round-trip rate will remain unchanged.

The new cash fare for automobiles will be $1.50 per round trip as originally proposed.

Truck rates will be increased by 50 per cent, with the retention of the 10 per cent scrip discount.

The original package, with elimination of commuter discounts, would have yielded some $39 million. The revised schedule will yield about $33.6 million. This total will approximate the Port Authority share of the cost of providing the capital funds for its four new mass transit projects. The reduction in revenue from the original $39 million eliminates a contingency provision of about $5 million for changes in construction costs, interest rates, and construction schedules.

All reduced rate ticket books now outstanding will remain valid until the expiration date printed on the book.

Supreme Court of New Jersey

Plaintiff's Supplemental Exhibits

ADMITTED INTO EVIDENCE
BY ORDER DATED
SEPTEMBER 2, 1975

Plaintiff's Supplemental Exhibit A

AFFIDAVIT OF LESTER J. MURPHY, JR.

SUPREME COURT OF NEW JERSEY

Docket No. 11498

September Term 1974

UNITED STATES TRUST COMPANY OF NEW YORK, ETC.
Plaintiff-Appellant,

—against—

THE STATE OF NEW JERSEY, *et al.*,
Defendants-Respondents.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LESTER V. MURPHY, being duly sworn, says:

1. I am a Vice President of Barr Brothers & Co., Inc., 40 Wall Street, New York, New York. Barr Brothers is a bond trading firm involved in underwriting municipal bond issues and is also a large dealer in municipal bonds in the secondary market, maintaining daily trading positions ranging from $5,000,000 to $18,000,000. I have worked with Barr Brothers in the field of municipal bond trading for 25 years, first as a trainee, then as a junior trader, then in the area of institutional sales, and since 1961, I have been responsible for the trading positions adopted by the firm in dollar bonds and for managing the accounts of institu-

Plaintiff's Supplemental Exhibit A

tional investors. My responsibilities require that I keep informed of the conditions of the bond market in general. In this connection, I have daily contact with representatives of banks, trust companies and other institutional investors as well as with other major municipal bond dealers and large stock exchange firms.

2. I have read and am familiar with the special report issued by Barr Brothers entitled the "Port of New York and New Jersey Authority In Mass Transit." I make this affidavit to refute any implication that this report represents a position by Barr Brothers regarding the effect of the retroactive repeal of the 1962 Covenant on the secondary market for Port Authority Consolidated Bonds contrary to my testimony in *United States Trust Company of New York* vs. *State of New Jersey et al.* before the Superior Court, Bergen County, New Jersey, on February 5, 1975. I was presented at trial as an expert in the operation of the secondary market for municipal bonds.

3. Barr Brothers' special report was prepared in May, 1975, shortly following the Superior Court's decision on May 14 upholding the retroactive repeal of the 1962 Statutory Covenant between the States of New Jersey and New York and with holders of Consolidated Bonds of the Port Authority.

4. The Superior Court's decision had a further serious adverse effect on the secondary market for Consolidated Bonds of the Port Authority. As a major holder of, and dealer in, Consolidated Bonds of the Port Authority Barr Brothers issued the Special Report in an attempt to support the market for such Consolidated Bonds and to calm, to the extent possible, investor concern regarding the present credit worthiness of the Port Authority. This investor

Plaintiff's Supplemental Exhibit A

concern has been and continues to be reflected in the "depressed levels" referred to in the Report. Such "depressed levels" were caused by and have prevailed since the retroactive repeal of the 1962 Covenant by the States of New Jersey and New York in April and June, 1974.

5. Barr Brothers' effort to support and improve the market for Port Authority Consolidated Bonds had very limited and short-lived success because institutional investors continue to be unwilling to purchase Port Authority Consolidated Bonds given the possibility of substantial involvement of the Port Authority in deficit rail mass transit operations.

6. I have reviewed the transcript of my testimony on February 5, 1975 and can repeat and reaffirm my testimony in general and the following aspects of my testimony in particular:

(a) Since the retroactive repeal of the 1962 Covenant in 1974 institutional investors who formerly were principal purchasers of Port Authority Bonds no longer consider such bonds an acceptable investment. After the repeal of the 1962 Covenant, and continuing to date, I know of no large institutional investors who are purchasing Port Authority Consolidated Bonds with one exception in a very limited amount.

(b) Since the retroactive repeal of the 1962 Covenant, the secondary market for Port Authority Consolidated Bonds has been extremely thin and sensitive since large investors are no longer willing to purchase such bonds. Since the prevailing bid prices would be severely depressed by a large offering of bonds, large investors have not offered blocks of

Plaintiff's Supplemental Exhibit A

Port Authority Bonds as they did in the past because of the market's thinness and sensitivity.

(c) Since the retroactive repeal of the 1962 Covenant, and continuing to date, investors have been unwilling to "swap" other bonds formerly considered comparable in quality and in intrinsic security for Port Authority Bonds because the investor is no longer satisfied with the security standing behind Port Authority Consolidated Bonds.

LESTER V. MURPHY, JR.

Sworn to before me this
27th day of June, 1975.

JUNE H. VENERY

Notary Public
JUNE H. VENERY
Notary Public, State of New York
No. 24-4003560
Qualified in Kings County
Commission Expires March 30, 1977

Plaintiff's Supplemental Exhibit B

NEWSPAPER ARTICLES EXPLAINING CONVERGENCE OF MASS PORT AND PORT AUTHORITY BONDS

THE BOSTON GLOBE
Thursday, March 20, 1975

BANK WOULD SUE A DUKAKIS MASSPORT

BY RACHELLE PATTERSON
Globe Staff

The New England Merchants Bank, trustee for the holders of $300 million worth of Massachusetts Port Authority bonds, yesterday said the move to reorganize the Authority by Gov. Michael S. Dukakis would "politicize" the agency. The bank threatened court action and placement of the Authority in receivership if a bill filed by the governor becomes law.

Mark C. Wheeler, chairman of the bank, said at a legislative hearing: "The Trustees' duty to protect the Authority's bondholders leaves it little choice but to challenge the bill in the courts and to seek damages in the amount of $310 million, plus interest and redemption premiums."

Wheeler said that the proposal by Dukakis to replace the present seven-member, policy-making board with a single administrator responsible to the governor and a four-member advisory board would amount to a "breach" of the Authority's contract with the bondholders. This breach, he said, entitles the bank to seek court action, "including, if necessary, petitioning for a receiver and demanding full payment of the outstanding amounts owed to the bondholders."

Frederick Salvucci, Massachusetts secretary of transportation said however that the governor's plan would not impair the obligations of the Authority's bonds. He said there is no provision in the trust agreement to prevent any reorganization.

Plaintiff's Supplemental Exhibit B

A major conflict between the banking and business community and Dukakis has developed over control of the Port Authority which could have long-range financial implications for future Authority revenue bonds.

What started out as a desire by the majority of the Authority's board to remove Edward J. King from his executive director's post in order to bring the independent agency, more in line with overall state planning has backfired and is resulting in a battle to remove the policy-making board altogether.

Legislation submitted by the governor to abolish the board and replace it with a single administrator responsible to him and a four-member advisory panel was heard yesterday before the Legislature's Committee on State Administration. The proposal will be discussed by the committee in a public executive session on Monday.

On the one hand, Wheeler argued that the legislation can "only aggravate the Authority's difficulties by making it totally subservient to political considerations and risk ultimate destruction of the Authority's usefulness to the Commonwealth."

On the other side of the issue, Salvucci contends that there is more stability in the establishment of a strong administrator who would serve the same term as the governor and be completely responsible to him.

Others involved in the controversy are the Port Authority board members, three of whom testified yesterday that they wanted to continue the current independent structure, and legislators who still feel bitter about the firing of King last November and want the present members of the board removed.

The move by the governor to assume control over the Port Authority comes at a time when the agency is making plans to develop the seaport which would involve

Plaintiff's Supplemental Exhibit B

borrowing additional funds. It also comes at a time when tremors are still being felt in the bonding market about all Authority bonds as a result of the recent default of New York's Urban Development Corp., the country's largest public housing developer.

After three hours of testimony, Sen. Alan Sisitsky (D-Springfield), chairman of the State Administration Committee, said: "I support the governor's proposal, but it is likely there will have to be significant modifications in order to achieve a board consensus. The board will probably have more authority than suggested by the governor."

Sisitsky said that if the legislation's constitutionality is challenged and the bank wins, then the state will have to make some dramatic adjustment in the law.

"If the Legislature passes the governor's bill and the legislation is upheld by the courts, then the banks can at the time of any future offerings demand higher interest rates because they can claim a lack of confidence in the new structure," he said.

The present non-paid board makes all decisions of the Port Authority, which controls Logan Airport, the Tobin-Mystic River Bridge, the seaport, and part of the civilian operations at Hanscom Field in Bedford. The members are appointed by the governor for seven-year staggered terms. The executive director, under the current procedure, carries out the decisions of the board. King was paid $58,500 a year.

Chairman of the Port Authority, J. Alan Fay, urged the committee to "give us a chance to meet the challenge before us." He said the authority now given to the board should continue.

Plaintiff's Supplemental Exhibit B

THE BOSTON GLOBE
TUESDAY, MARCH 25, 1975

MASSPORT COMPROMISE BILL LETS DUKAKIS NAME BOARD

BY RACHELLE PATTERSON
Globe Staff

Gov. Michael S. Dukakis will be able to appoint a single administrator and five members of an advisory board under a bill reorganizing the Massachusetts Port Authority approved by the Legislature's Committee on State Administration yesterday.

The bill, a compromise version, gives Dukakis the appointing power he sought to better control the authority, but the five-member board would have staggered five-year terms.

Dukakis wanted both the board and the administrator to serve coterminous with him. The new version also strengthens the board by giving it approval power on key issues, including revenue bonds, tolls on the Mystic-Tobin Bridge, buying property and issuing contracts.

Mindful of a warning issued last week by the New England Merchants National Bank, trustee for the holders of $300 million in Port Authority bonds, Sen. Alan Sisitsky (D-Springfield), chairman of the State Administration Committee, said the bill is regarded as "litigation-proof."

Secretary of Transportation Frederick P. Salvucci, meanwhile, said he hopes to get Dukakis's reaction today at the weekly cabinet meeting. He said the governor "strongly wanted a coterminous board," but that the measure was "a step in the right direction."

The bill will move to the House and Senate for action. Amendments can be made to the measure reported out of

the committee on the floor of either branch.

Gordon Silver, an attorney with the law firm of Choate, Hall and Stewart, which represents Merchants Bank, attended yesterday's session and expressed surprise at the quick action by the committee with no further input from the bank.

Silver said the bill approved by the committee will be "carefully examined by the bank in light of the trustees' concern and feelings."

At a public hearing last week, Mark C. Wheeler, chairman of the bank, threatened the Port Authority with court action and receivership because the move by Dukakis was interpreted by Wheeler as an attempt to "politicize" the authority.

Silver said, that in his opinion, the staggered terms, ranging from one year to five years, made it "less political" but that such reorganization creates a "dangerous precedent." He said: "What is there to stop future governors from changing the structure to suit them?"

The committee's version sets the administrator's salary at $45,000 annually, as requested by the governor. If the administrator wants more money, he would have to petition the Legislature for a raise.

The administrator would serve as chairman of the unpaid board of five members, but would have no vote. The five members would be appointed by the governor for staggered terms ranging from one to five years, and one member would have to be from organized labor, one from administration and finance, and one from the community in which an authority facility exists.

While the board would have control of financing projects, the administrator would be able to initiate study of the need for construction of new facilities and make any necessary studies of new modes of transportation, including mass transit, bus and truck terminals, off-street parking facilities and railroad terminals.

The committee also voted to remove from the legislation the Port Authority's power to take public property by eminent domain. It retained, however, authority to take private property for any new projects it may undertake in the future.

Plaintiff's Supplemental Exhibit B

THE SPRINGFIELD UNION
SPRINGFIELD, MASS., TUESDAY, MARCH 25, 1975

PANEL OKAYS MASSPORT OVERHAUL BILL

By JAMES M. SHANKS
Union Staff

The Legislature's Joint Administration Committee Monday reported out a bill which would completely overhaul the administrative structure of the Massachusetts Port Authority.

Major portions of the bill came from Sen. Alan D. Sisitsky, D-Springfield, Senate chairman of the committee.

The bill essentially ends the previously dictatorial powers of the executive director of Massport and makes the whole authority more responsible to the governor, Sisitsky said.

Impetus for the legislation, which is expected to pass both houses substantially intact, came from the six-year battle between former Gov. Francis W. Sargent and Massport Executive Director Edward King.

The present board of seven members serving staggered seven-year terms would be reduced to five persons serving staggered five-year terms. One member must be a representative of organized labor, one an expert in administration and finance—possibly a representative of Massport bondholders—and one a resident of a community in which a Massport facility exists, such as Logan Airport in East Boston.

The administrator would be appointed directly by the governor—not the board—and serve at the pleasure of the governor. He would be a non-voting ex-officio board member. Presently the board appoints the administrator.

Plaintiff's Supplemental Exhibit B

The salary of the administrator would be reduced from nearly $60,000 to $45,000, the same as the administrator of the Massachusetts Bay Transportation Authority and $5,000 more than the governor.

"The governor wanted a purely advisory board, with every member serving coterminous with the governor. We refused to accept either," Sisitsky said.

The board will have power to restrain the administrator in the key areas of issuing bonds, setting toll rates, purchasing property, exercising eminent domain, and the letting of contracts over $250,000, Sisitsky said.

Massport operates most of the Boston Harbor shipping facilities, Logan Airport, the Mystic River Bridge, and Hanscom Field.

A trustee for Massport bondholders threatened to bring suit against the state—possibly demanding immediate payment of more than $300 million in outstanding revenue bonds, if the Legislature acted to change the structure of the authority, which has not been substantially revised since its inception in 1954.

Sisitsky said the current bill would probably withstand that or any other court challenge.

"We want to make Massport more responsive to the direction of the governor, particularly future governors," Sisitsky said. "At the same time this will protect the bondholders, have no adverse impact on Massport revenues, and withstand any Constitutional attack in the courts."

Gov. Michael S. Dukakis would appoint all five members of the board if the legislation passes, with the next governor appointing one member each year, with the option of appointing the administrator as well. Board members will not be salaried.

Sisitsky said the bill represents a compromise between what Dukakis sought and what he thought would be advisable."

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SPRINGFIELD, MASS., DAILY NEWS,
TUESDAY, MARCH 25, 1975

DUKAKIS GIVEN AUTHORITY OVER MASSPORT

BY RICHARD GAINES

BOSTON (UPI)—The legislature's State Administration Committee has endorsed a bill giving the governor control over the Massachusetts Port Authority.

Under the bill, which was reported Monday for House action, the director of the authority would be chosen by the governor, not the board of directors as is presently done.

The legislation, an amended version of a proposal submitted last week by Gov. Michael S. Dukakis and his transportation secretary, Frederick Salvucci, represents the most serious effort at reorganizing MassPort since its creation.

Sharp Protest

If adopted, the bill is almost certain to bring sharp protests from holders of $310 million in revenue bonds. The New England Merchants National Bank, trustee for the bondholders, warned the legislature any reduction in the independence of the authority might mean law suits.

Mark Wheeler, chairman of the bank's board, told the committee any change in the structure "which erodes the independence and non-partisanship of the port (authority) would impair the bondholders' (investment) and would bring on legal action including the possibility of seeking a bankruptcy ruling."

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The committee proposal makes a number of changes in the Dukakis-Salvucci plan, but concedes their major request—for a Massport administrator serving at the governor's pleasure.

Executive Director

At present, the seven-member Massport board, which consists of gubernatorial appointees serving seven-year staggered terms, picks the executive director.

This structure has insulated Massport from control from Beacon Hill, but at the same time has left the authority from time to time in philosophical conflict with the governor and legislature, especially on issues such as runway expansion.

The committee bill abolishes the Massport board, replacing it with a five-member advisory board, named by the governor to staggered five-year terms. Dukakis suggested creation of a powerless advisory board, but the committee bill gives the board some authority.

Propose Board

Without prior approval of the proposed board, the administrator would be prohibited from issuing bonds, changing tolls, buying property, exercising eminent domain authority, signing arrangements or contracts over $250,000.

Administration sources, however, said those limitations would not inhibit the full integration of Massport as an important cog in the implementation of political and social policy.

The one possible objection from Dukakis is over a provision making Massport subject to the state's collective bargaining laws.

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THE BOSTON GLOBE
THURSDAY, MARCH 27, 1975

COMMITTEE REVERSES ACTION ON MASSPORT CONTROL

BY RACHELLE PATTERSON
Globe Staff

Gov. Michael S. Dukakis persuaded the Legislature's Committee on State Administration yesterday to reverse its previous vote and make the terms of all five members of the advisory board of the Massachusetts Port Authority coterminous with that of the governor.

Dukakis told the committee at an executive session that staggered terms under the proposed reorganization of the agency would make it difficult to carry out state policy.

On Monday the committee approved legislation that would permit the governor to appoint a single administrator and a five-member advisory board which would have five-year staggered terms.

Sen. Alan Sisitsky (D-Springfield), the committee chairman, said the vote yesterday was 9-6 to make the terms coterminous. Sisitsky said it was decided early yesterday to invite the governor to the executive session.

"It was the courteous thing to do," he said. "He appeared and we heard his argument. He convinced members to make both the administrator and board members coterminous."

Sisitsky, who on Monday said the bill agreed upon by the committee was "litigation proof," declined to say what effect making the terms of both the administrator and the board coterminous with the governor's terms would have

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on threatened court action by the New England Merchants Bank, trustee for the Authority's bond holders.

The bank's position is that the reorganization proposal "politicizes" the Port Authority, and may not be in the bondholder's best interests.

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THE BOSTON GLOBE
WEDNESDAY, APRIL 9, 1975

MASSPORT BONDS IN DOUBT AS TAXES, CHANGES LOOM

BY RACHELLE PATTERSON
Globe Staff

Boston investment counselors said yesterday the Massachusetts Port Authority will not be able to float any new revenue bonds for improvements because of the several moves pending in the Legislature to reorganize and tax the agency.

The controversy over the Authority's operation could adversely affect plans by Gov. Michael S. Dukakis to float general obligation bonds to pay for part of the state's expected $400 million deficit.

Floating new bonds by the Authority while the Legislature is trying to change its structure would be unthinkable, according to Elma Woods, consultant for Shearson Hayden Stone, a Boston investment firm. "It couldn't be done."

Edward T. Hanley, interim executive director of the Authority, said yesterday the Authority improvement fund is committed until 1976 and that requests have been received from the airlines and other lessees for $20 million worth of improvements, for which there is no money.

He said that, if the Authority wanted to borrow the money to improve the seaport or make needed repairs to its properties or for any other purposes, there is no way the bonds would be marketable.

Douglas Lyons, an officer of Weeden & Co., Boston investment firm, said it would be out of the question to float any Authority bonds until the political problems are resolved.

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He said the move by Dukakis to take over control of the agency through his reorganization proposal and the various tax measures have generated a loss of confidence by the investors in the agency and in state government issues generally.

"Call any bank; they'll tell you," he said. "There is no question that the controversy over the Port Authority will lower investor confidence. If the governor decides to float a bond issue to pay for the state's deficit, he will be able to get a bid but will probably have to pay a higher interest rate."

As the investment analysts were commenting on the rippling effect the controversy could have on future bonding, a poll of some members of the Legislative Committee on Taxation was under way to determine whether a bill will be reported out of committee which would impose taxes on the Authority or its lessees.

The committee, after a three-hour session with officials of the Authority, voted, 9-7, to draft a tax bill and report it favorably. The House chairman, however, Vincent Piro (D-Somerville), who opposes all 18 bills which seek to impose taxes on the Authority, moved to poll the entire committee of 21 members in an attempt to kill all the bills.

The results of the poll will be announced at another executive session, scheduled for this morning.

Rep. Michael Connolly (D-Boston), who began lobbying for support for a bill to tax just the private businesses at Logan—such as Hertz Rent-a-Car or the Hilton Hotel—soon after the polling began, predicted victory for his side.

Frederick Salvucci, secretary of transportation, informed the committee that the governor is now in favor of a nar-

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rower bill to tax private businesses at the airport rather than the broader measure to tax all the Port Authority property.

After meeting with members of the financial community, Salvucci said advancing such a broad taxing measure "could affect the state when it decides to float bonds." He said he didn't want to "hurt that effort."

The strongest support for taxing the Authority or its lessees comes from Boston legislators who are looking for ways to broaden the city's tax base. The measure to tax private businesses was narrowly defeated last year, despite a ruling from the Supreme Judicial Court that such taxation is legal.

In 1956, when the law establishing the Massachusetts Port Authority was enacted, the commercial airlines industry was still developing. To encourage its growth, a tax-exempt status was given its properties.

Private businesses on Authority-owned property outside the airport peninsula, such as Jimmy's Harborside restaurant, pay $1.4 million in taxes to the city. Airlines pay $5 million in personal property taxes to the city as well.

Profit-making businesses at the airport pay the Authority a certain percentage of their gross revenue in lieu of taxes to the city. Lease contracts between the Authority and the businesses vary, both in percentage of revenue and in length of term.

In turn, the Authority furnishes the businesses with fire, street cleaning, sewage and other services.

In fiscal 1974 the Authority received $8.5 million from rentals at the airport and $9.8 million from concessions. Total gross revenue was $47 million.

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Coopers & Lybrand, a private accounting firm hired by the Authority, told the taxation panel yesterday that the variety of taxation proposals before it could cost the Authority $3 million to $45 million a year in taxes.

They also estimated that the replacement value of all the Boston property of the Authority—Mystic-Tobin Bridge, airport and seaport—was $600 million.

Hanley said the proposal to tax just the private businesses would result in a substantial loss in Authority revenue, because most leases allow the lessee to deduct the tax payment from the rental payment.

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SPRINGFIELD, MASS., DAILY NEWS
TUESDAY, MAY 20, 1975

SENATE WILL VOTE TODAY ON MASS. PORT TAKEOVER

BOSTON (UPI) — The Senate today was expected to debate and vote on Gov. Michael S. Dukakis' controversial plan to take over the Massachusetts Port Authority.

It was likely the debate will produce a rare confrontation between the two most powerful senators—President Kevin B. Harrington, D-Salem, and Senate Ways and Means Committee Chairman James A. Kelly Jr., D-Oxford.

Control Asked

Harrington, at the request of the governor, was prepared to submit a bill that would give Dukakis—and future governors—firm, personal control of Massport which owns and operates Logan International Airport and the Mystic River Bridge.

But the proposal that will come out of Ways and Means and onto the floor is Kelly's bill which, over Dukakis' objections, falls far short of giving him the kind of control over the Port Authority that he seeks.

Under the Ways and Means Committee concept, the present Massport Board of Directors would be retained and would continue to serve staggered terms but the governor, for the first time, would have a veto over decisions to hire and fire the executive director.

"This plan," said Kelly, "gives him (the governor) a man who represents his interests but insulates the director from political influence."

The Dukakis-Harrington concept, which was endorsed last month by the State Administration Committee, would

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replace the seven-member board with a five-member board whose terms would coincide with the governor's. But the board would have virtually no authority. That would reside with the director who also would be chosen by the governor.

Relationships

Sen. Alan D. Sisitsky, co-chairman of the State Administration Committee and a Dukakis loyalist, and the governor himself declined last week to speculate on the outcome of the Senate debate over Massport.

"The fate of the bill," Sisitsky predicted cryptically, "will reflect the governor's relationship with the legislature. Actually, its up to Kevin Harrington," he said.

Harrington's Press Secretary John Abbott said Harrington would submit Dukakis' bill but would not exert influence to insure its adoption. "He'll offer it and there'll be a vote," said Abbott. "The president is doing it at the request of the governor."

Dukakis initially said he would sign but not submit legislation reforming the Port Authority structure but eventually decided he would make the issue a priority item in his legislative package.

The governor said he felt the time was right for a change in the agency whose structure has remained the same since it was created in 1956.

Controversial Move

After the election but before Dukakis took office, the directors ousted Executive Director Edward J. King in a highly controversial move. It was alleged but never proved that Dukakis had given the go-ahead for the firing to the

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four Massport board members who were allied with him ideologically.

Dukakis has denied any involvement in the ouster of King—a favorite of the business community but considered an enemy of activists from communities near the airport.

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SPRINGFIELD, MASS., DAILY NEWS
WEDNESDAY, MAY 21, 1975

SENATE DEBATE ON PORT AUTHORITY TO RESUME—
REPUBLICANS SEEK VOTE TO TABLE FOR NOW
BY RICHARD GAINES

BOSTON (UPI)—The Senate debate on whether to give Gov. Michael S. Dukakis control over the Massachusetts Port Authority was scheduled to resume today on a motion to table the matter.

That motion was made Tuesday by Assistant Senate Minority Leader David H. Locke, R-Wellesley, who looked at a series of complex proposed amendments and suggested majority Democrats get their heads together on the issue.

Locke was referring to an apparent dispute between the two most powerful senators, President Kevin B. Harrington, D-Salem, and Ways and Means Committee Chairman James A. Kelly Jr., D-Oxford.

Harrington supports the governor's efforts to take control of Massport and its two major properties—Logan International Airport and the Mystic Tobin Bridge—while Kelly is pushing a compromise position giving the governor only a veto power over the hiring and firing of the Massport director.

Majority Vote

Under the present structure, the seven Massport board members choose a director by majority vote. The directors serve staggered terms which ostensibly insulate them from political influence. However, during the period between the election and Dukasis' ascent to office the board voted 4-3 to fire director Edward J. King.

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Their allegations—never proved—that Dukakis manipulated King's ouster to set up his takeover of the authority. These charges Dukakis has categorically denied.

The Senate was not expected to delay action on the bill. But, after debate opened on the issue Tuesday, Kelly predicted the matter was far from resolved.

"I think this will be on the calendar for a long time yet," said Kelly. "I don't think even Jimmy the Greek would give odds on this one."

But Sen. Alan D. Sisitsky, D-Springfield, who was the leading advocate of giving the governor control over Massport, said "we're going to win in the Senate." He declined to make a similar prediction about House action.

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SPRINGFIELD, MASS., DAILY NEWS,
THURSDAY, MAY 22, 1975

MASSPORT TAKEOVER BACKED BY SENATE
BY RICHARD GAINES

BOSTON (UPI)—Somewhat grudgingly, the Massachusetts Senate has pushed Gov. Michael S. Dukakis one step closer to one of his major goals—to bring the Massachusetts Port Authority under his control.

The 25-10 roll call Wednesday —the first floor test of legislative leanings on the issue—came after only token debate between Sen. Alan D. Sisitsky, D-Springfield, who said the bill would make Massport more accountable, and Sen. John F. Parker, R-Taunton, who complained the move could be disastrous for Logan International Airport, the prime Massport property.

Second Vote

Though the vote was overwhelming, the Senate must give the controversial bill a second vote before it moves to the House. House opponents were expected to marshal their forces to block the Massport takeover.

If the legislation becomes law, the trustee for the stockholders say they will file a federal court suit challenging the change on grounds the move could jeopardize their investment. The trustee is the New England Merchants National Bank.

Under the Senate-approved bill, the governor would choose the director of the Port Authority. Under its present structure, a seven-member board, serving staggered terms, choose the director by majority vote.

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Change of Mind

The governor originally said he would sign—but not submit or push—a bill to make him and his successors directly accountable for the operation of the Port Authority. But after his election and the firing of Executive Director Edward J. King, Dukakis changed his mind and submitted a bill to take control over the authority.

It was approved by the State Administration Committee but the Senate Ways and Means Committee moved to strike a compromise between the status quo and Dukakis' proposal. It would have given the governor only a veto over the selection and firing of the executive director.

However, Dukakis convinced Senate President Kevin B. Harrington, D-Salem, to intervene personally to see that his bill was approved.

Many senators who voted for the governor's bill were not completely pleased with it. One, Sen. Michael J. LoPresti, D-Boston, who lives in East Boston, directly adjacent to the airport, said he was voting with the governor only with misgivings.

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THE BOSTON GLOBE
THURSDAY, MAY 22, 1975

SENATE MOVES TO GIVE GOVERNOR CONTROL OF MASSPORT

BY WILLIAM A. HENRY 3D
Globe Staff

The state Senate approved yesterday a Massachusetts Port Authority reorganization proposal similar to that of Gov. Michael S. Dukakis that he be given direct control of the agency.

The 25-10 vote, on amending an amendment of a twice-rewritten bill, restored Dukakis's plan for an executive director reporting to the governor and a five-member advisory board coterminous with him.

But several members gave notice they would try to introduce amendments—some completely new—on the next round of required approval in the Senate.

The Massport bill will be sent then to the House, where further debate and attempts to amend are expected.

Reorganization of the Port Authority to restore it to the political process is opposed by banks, bondholders and Republicans and has become one of the few partisan issues of the legislative session.

The proposed reorganization has also prompted warnings from the business community that any change hurting bondholders could also lower the state's bonding credit rating and thereby increase its interest costs.

In addition, a consortium of banks representing bondholder interests has pledged a suit to oppose the reorganization, contending that any change in Massport's independence could lead to a siphoning off of revenues that

would lessen their chances for steady repayment of interest and principal.

New York and New Jersey won a similar suit against the New York Port Authority bondholders who tried to block that agency's involvement in mass transit.

The Massachusetts Supreme Judicial Court held last year that the state could legally increase taxes on Massport properties, although the move would clearly reduce revenue available to pay bondholders.

Opponents of the reorganization say the present structure—an independent seven-member board, named to staggered terms, and a chief executive answerable only to the board—has been basic to the authority's 19-year evolution from a money loser to a major moneymaker.

"If this (reorganized structure) had been in effect since 1956," Republican floor leader John Parker (Taunton) said, "you wouldn't have been able to land a Piper Cub over there."

Democrats offered mostly partisan arguments for the reorganization, which Gov. Dukakis has made one of his priorities.

The floor leader for the bill, Alan D. Sisitsky (D-Springfield), said senators should support reorganization because it would not hurt bondholders and because it reflects "input" from a range of legislators.

Sisitsky did not explain why he thought bondholders would be protected despite the change, but he cited the New York and Massachusetts court rulings in saying that the state is not obliged to place bondholder interests first in any case.

Dukakis made Massport's unresponsiveness to neighboring communities a campaign issue, and the senator who represents most of them, Michael LoPresti Jr. (D-East Boston), described the proposed reorganization as "slightly more responsive because the governor goes to the people every four years."

LoPresti said however, that he was far from satisfied that the reorganization would mean any benefit for his community.

"This bill does not make anyone more responsive," he said. "It just shifts power from one man to another . . . I am coming to believe we will never see a progressive Massport bill in here that deals with the real issues of soundproofing, planning and curfews."

Several Democratic members broke with the governor on Massport, and others who voted for the bill said in interviews they did so reluctantly.

One Democrat who voted against Dukakis was James A. Kelly Jr. (D-Oxford), chairman of the Senate Ways and and Means Committee and a fiscal adviser to the governor.

Ways and Means wrote a defeated amendment that would have limited the governor to veto power over the selection of the executive director. Kelly's advocacy of that plan marked a rare split between him and Senate President Kevin B. Harrington.

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THE BOSTON GLOBE
TUESDAY, JUNE 3, 1975

SENATE SUPPORTS DUKAKIS BID TO CONTROL MASSPORT

BY WILLIAM A. HENRY 3D
Globe Staff

Gov. Michael S. Dukakis, who has been having trouble winning legislative backing for his budget and fiscal policies, won another round yesterday in his bid to take control of the Massachusetts Port Authority.

The Senate, on a vote of 28-5, approved the governor's proposal with one major change.

The change—added on a voice vote yesterday—was a cut in the salary of the executive director to $39,000, or less than Dukakis's own $40,000 salary. The bill now goes to the House.

Dukakis had proposed the director be paid $45,000. Massport has been without a permanent executive since last Nov. 21, when Edward J. King was ousted by a 4-3 margin of the current board. King was earning $58,500 a year and was the highest paid official in state employ.

Senate Republicans have led the fight against Dukakis's reorganization plan, and after the salary was cut GOP floor leader John Parker (R-Taunton) predicted "there are very few people in the country who will take that job for that kind of money."

The Republicans' major objection to the governor's plan is economic: they claim returning the now-independent Port Authority and more particularly Logan Airport, to political control will destroy the economic and revenue-returning growth it has made since removed from direct

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supervision in 1956. Then a money loser, Massport is now probably the most successful economic development agency in Massachusetts.

Democratic senators have said privately they see Massport control as a partisan issue, in part because Republicans have chosen to make it one. Democrats are antagonistic, both publicly and privately to GOP concern for the rights of Massport bondholders.

The reorganization bill's floor manager, Senate chairman Alan D. Sisitsky (D-Springfield) of the State Administration Committee, argued that Massport's economic base is solid and that decisions about expansion, operations and use of funds should be made responsive to the public interest rather than to bondholder concerns.

Dukakis has long advocated compelling Massport to involve the communities adjoining the airport and appointed Frederick P. Salvucci, who organized anti-Logan sentiment while East Boston Little City Hall manager, as state Transportation secretary.

But the senator from the airport's neighboring communities, Michael J. LoPresti (D-East Boston), tried unsuccessfully to retain the quasi-independent board. His community would have no recourse under the new plan, he said, if some future governor opted for airport expansion.

Massport is run now by a seven-member board, appointed by the governor to staggered seven-year terms, with full power to hire or fire a chief executive. Dukakis's plan, as amended with his collaboration, would provide for a board whose term coincided with the governor's and would enable him to hire and fire the executive.

The executive, in turn, would have sole power to grant all contracts of less than $250,000—something Parker labeled an invitation to graft and corruption.

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Parker's assistant leader, David H. Locke (R-Wellesley), moved reconsideration of yesterday's approval vote. Debate on Locke's motion is scheduled today. Locke has said he is "exploiting to the fullest" the parliamentary devices for stalling passage of the bill—but his reconsideration move is his last chance.

Should the House vote for a different version of the bill, however, the delaying tactics can start anew. A spokesman for House Speaker David M. Bartley said eventual approval is likely, but could not say when the bill will be debated.

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SPRINGFIELD, MASS., DAILY NEWS

TUESDAY, JUNE 3, 1975

DUKAKIS SCORES VICTORY FOR CONTROL OF MASSPORT

BY JAMES R. DORSEY

BOSTON (UPI)—Gov. Michael S. Dukakis won a major victory in the Senate with overwhelming approval Monday of his plan to control the controversial and powerful Massachusetts Port Authority.

However, the bill faces a more uncertain future in the House where antagonistic feelings are running high against Dukakis because of his budgetary package.

"It's gonzo in the House; they'll croak it," said one senator who fought for the governor's bill. "There's too much antagonism against him."

Priority Items

The Massport reorganization bill was one of a handful of priority items submitted by Dukakis earlier this year. Bringing control and accountability over the port authority had been one of his campaign promises.

Under the bill, the current seven-member Massport board which serves staggered terms would be replaced by a five-member body picked by and serving terms equal to the governor.

The board's executive director would serve at the pleasure of the governor. Currently, the director serves at the pleasure of the board.

Senate approval of the measure came on a 25-8 roll call. The vote was to be reconsidered today but that was seen as a mere formality.

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Banks Opposed

In addition to the eight Senate votes against the bill —most of them coming from Republicans—the bill is opposed vehemently by the state's banking community, which holds a majority of the authority's $310 million worth of bonds.

Mark Wheeler, chairman of the board of New England Merchants National Bank, months ago told the legislature that as trustees for the bondholders they would fight any change in the authority's structure.

"Any change in the structure which erodes the independence and non partisanship of the port (authority) would impair the bondholders' (investment)," Wheeler said.

Amendments Fail

Three amendments were attempted Monday which would have given some independence to the revised authority. They failed handily. Only one, changing the salary of the executive director from $45,000 to $39,000, prevailed.

Senate Minority Leader John Parker, R-Taunton, said giving the governor power over Massport was "a dangerous thing." He and other Senate Republicans warned that the state would be sued by the Massport bondholders.

State Administration Chairman Alan D. Sisitsky, D-Springfield, carrying the bill for the governor, said the reorganization suggested by Dukakis was the only way to make Massport accountable to the public.

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NEWSPAPER ARTICLE ANNOUNCING NEW JERSEY'S DECISION NOT TO FUND LOCAL SHARE OF PLAINFIELD EXTENSION

DAILY NEWS

MONDAY, FEBRUARY 24, 1975

SAGNER DIAGNOSES JERSEY'S TRANSIT MALADIES

Here are highlights of the One-on-One interview with Transportation Commission Alan J. Sagner. He was interviewed by John McLaughlin, Trenton Bureau Chief for The News.

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PAYING FOR PATH-PLAINFIELD

The governor has directed us to proceed with this project. We are now discussing with the Port Authority how we handle the local share. There is about $80 million of funds that are needed to match the federal share.

Q: Are you, in a sense, reneging on the commitment that Gov. Cahill made to put up that local share?

A: I can't renege on a commitment that in my opinion was never made. If it's not funded, it wasn't a commitment—it was an undertaking. First of all, $40 million won't do the job now. Secondly, the $40 million is not here. We made a proposal to the Port Authority on a way the $40 million could be raised on a leased arrangement, but whether that will be acceptable or not I don't know. What I would prefer to see is that the Port Authority would put up the money.

Q: Are you going to insist on that?

A: No, this is nothing I'm going to insist upon—there is no point in insisting like that. The obligation of the state then would be to be concerned with the operating costs. Then the state would just subsidize it like every other line.

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ON HOLDING COSTS DOWN

I think at some point we are going to have to say that we can't continue to pay the price, and that the people who operate the facilities are going to work for wages that are comparable to what other people in the economy are getting, and give productivity in return for that. We probably cannot continue to afford to underwrite public transportation. An example of what I'm talking about is the New York City subway system, where the wages that are paid are sometimes in excess of those for a person with an advanced degree.

I'm suggesting a wage-price freeze—which is contrary to the governor's view. The governor doesn't believe in it because he doesn't believe it would work, but I believe if we continue to chase our tail, we give labor an increase with one hand and we take it away with higher prices with the other hand, and the only person that really gets caught in the squeeze is the person who is on pension or on a fixed income—the farmer, the retired people.

Q: You are suggesting that a bus driver is overpaid?

A: No I'm not saying he is overpaid. We are going to say that if the bus drivers in New Jersey are going to have to receive what the MTA (Metropolitan Transportation Authority) is paying in New York, then the State of New Jersey, with its present resources is not going to be able to meet it.

ENVIRONMENT VS. ECONOMY

I have no argument with environmental groups. I have an argument with the environmental laws that apply ex post facto. In other words, we have a project that has been approved, we've began our planning for it and environmental laws or new regulations are issued and they are

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applied to that project and then we stop and we try to do studies in accordance with the new regulations. We start the project again, new regulations come out when we are in another stage of development, and we stop again. My position is that once a project has had a public hearing and it has been approved that it be permitted to proceed and that the environmental regulations apply to subsequent projects.

ON PUBLIC TRANSPORTATION

I am constantly arguing with people who say we don't need public transportation, and if we can put a man on the moon, we can find another solution to the energy problem. I didn't believe that was true then and I don't believe it now. I also don't believe that we can disregard our highways and move everybody on public transportation. We have to use car pools and we have to use public transportation when it's proper to do so. It might not be convenient, but you have to live with it.

ANOTHER FUEL CRISIS?

I don't know that we will have a crisis. The fact that we are paying what we are paying for fuel is a crisis. The cost of energy is the crisis, not that you have to line up your car at a pump and wait for it—that's not the crisis. I just received notice today from one of our bus operators that Amoco raised the price of diesel fuel two cents. Now, on the other hand, I read where Saudi Arabia is cutting back in production and tankers are standing around idle because there is an oversupply of fuel. So it's not a crisis that it isn't available but that there is a tight control of the price, and the cost is very high. It's estimated that if we continue to purchase foreign oil at the rate we are doing, within a decade we will have shipped abroad the equivalent value of all the stocks on the New York Stock Exchange.

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NEWSPAPER ARTICLE ANNOUNCING NEW JERSEY'S DECISION NOT TO FUND LOCAL SHARE OF PLAINFIELD EXTENSION

THE COURIER-NEWS,

MONDAY, FEBRUARY 24, 1975

SAGNER OFFERS A PATH DEAL

TRENTON (AP)—State Transportation Commissioner Alan Sagner says the Port Authority of New York and New Jersey should put up the entire local share of the cost to extend the PATH rail line to Plainfield.

After that $80 million bite, Sagner said, New Jersey would agree to subsidize operating deficits on the line.

Sagner's comments in today's New York Daily News continued to cloud the future of the rail project. The state and the port authority have been unable to agree on how the local share should be raised since the project was announced in 1972.

If an agreement ever comes, the rest of the cost of the $347 million project is to be paid with federal aid.

Sagner contended that the state never committed itself to share the $80 million local cost with the port authority. He said the administration of former Gov. William T. Cahill "never appropriated any funds so there was no firm commitment" for the state to put up $40 million.

"We think the port authority should be responsible for capital construction costs and then as far as the state is concerned the obligation should be with operating costs," Sagner said.

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STANDARD & POOR'S REPORT

DATED JUNE 16, 1975

MUNICIPAL ANALYSES AND BRIEFS

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

$100-million Notes Rated "A"

The Port Authority of New York and New Jersey plans to negotiate on June 16, the sale of $50,000,000 Consolidated Notes, Series BB, due June 1, 1978, and $50,000,000 Consolidated Notes, Series CC, due June 1, 1978. The Notes will be callable at par on and after December 1, 1976. Proceeds of the Series BB Notes will be used for various capital expenditures, provided that not more than 10% of such proceeds will be used in connection with the World Trade Center and certain portions of an extension of the Port Authority Bus Terminal. Proceeds of the Series CC Notes will be used for financing the cost of completion of the World Trade Center.

These Consolidated Notes are Consolidated Bonds of the Authority within the meaning of the Consolidated Bond Resolution adopted by the Authority on October 9, 1952. They are direct and general obligations for which the full faith and credit of the Authority are pledged. They are secured equally and ratably with all other Consolidated Bonds and Notes by a pledge of (a) the net revenues of all existing facilities of the Authority (not including cars acquired under the New York State's Commuter Car Program) and any additional facilities financed in the future by Consolidated Bonds, (b) the General Reserve Fund of the Authority equally with other obligations of the Author-

Plaintiff's Supplemental Exhibit E

ity secured by that Fund, and (c) the Consolidated Bond Reserve Fund

Although it is anticipated that these Notes will be refinanced by long term Consolidated Bonds, the Authority does have the resources to retire them without such refinancing, if necessary. For the year ended December 31, 1974, the Authority reported net revenues available for debt service and reserves of $179 million (up from $157 million in 1973 and $140 million in 1972). In addition, it is estimated that recently revised toll schedules for the Authority's six interstate vehicular crossings will result in additional revenues of $33.6 million. These two revenue figures combined total approximately $213 million, nearly equal to the estimated 1978 debt service, on Consolidated Bonds and these $100 million Consolidated Notes, of $216 million. As noted above, the Notes also are secured by the General Reserve Fund, which totaled $173.5 million on December 31, 1974, substantially more than sufficient to retire the Notes, if necessary.

In 1974, the states of New York and New Jersey repealed the statutory covenants adopted in 1962 limiting the Port Authority's ability to apply pledged revenues and reserves to additional deficit passenger railroad facilities. The validity of the 1974 repeal is presently being litigated. We have expressed concern in the past about the possibility of such a repeal and will continue to watch closely the effect of future Authority involvement in mass transit developments on the credit worthiness of the Authority's debt securities.

Despite this concern, we are continuing our "A" rating on the Port Authority's Consolidated Bonds and are also rating the new Consolidated Notes "A" based upon the Authority's strong operating, financial and management record and the prospects for a continuation of this outstanding record.

Plaintiff's Supplemental Exhibit F

MOODY'S REPORT

DATED JUNE 11, 1975

MOODY'S INVESTORS SERVICE, INC.

MUNICIPAL CREDIT REPORT

June 11, 1975
RC

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

Rating: Consolidated Bonds and Notes: A

Offering: $100,000,000 Consolidated Notes comprising $50,000,000 Series BB and $50,000,000 Series CC, for negotiated sale in June 1975

Dated: 6-1-75 Due: 6-1-78 Call: beginning 12-1-76

L.O.: Patrick J. Falvey, Authority General Counsel; Hawkins, Delafield & Wood, N. Y.

Type enterprise: bi-state agency of New York and New Jersey which operates air terminals, toll bridges and tunnels, marine terminal facilities, World Trade Center, PATH rail transit system, other facilities including bus stations, truck terminals, heliports

Pledged revenues: notes are direct and general obligations of the Authority secured equally and ratably with all other Consolidated Bonds and Notes by a pledge of the net revenues of the existing facilities of the Authority, the General Reserve Fund of the Authority,

and the Consolidated Bond Reserve Fund of the Authority

Purpose: Series BB notes—capital expenditures for bridges and tunnels, docks and wharves, airport terminal and service buildings, Hudson Tubes portion of PATH, parking and storage facilities directly related to any of these, and World Trade Center. No more than 10% of proceeds are to be used for World Trade Center capital expenditures and those integral portions of an extension to the Port Authority Bus Terminal related to any future construction above the extension

Series CC notes—financing cost of completion of the World Trade Center

Summary and Opinion: This bi-state agency maintains earning capability to meet requirements and to service its Consolidated Bonds within reasonable margins. Net revenues from the airports, marine terminals, and toll bridges and tunnels more than offset deficits of the PATH commuter rail system and the World Trade Center at this time.

The Superior Court in New Jersey has upheld New Jersey legislation that repealed the 1962 covenant restricting Authority involvement in deficit mass transit operations. This decision is a matter of deep concern to bondholders generally, and the decision has been appealed. The effect on the Authority cannot be determined at this time in absence of a definite plan for financing mass transit projects and facilities deemed to be non-self-sustaining. In the meantime, earnings of the present facilities are good, reserves for debt service continue strong, and recent toll

increases have further strengthened financial position at this time.

These obligations of the Authority now being offered, while stated as Consolidated Notes, are considered as bonds by the Authority and the A rating on the Authority's Consolidated Bonds that was recently confirmed (see our Review Report dated 5-22-75) is also applicable to the Series BB and CC notes for the reasons stated above as well as the claim on earnings and provisions for retirement. Notes are being issued in conformity with the Consolidated Bond Resolution of 1952. Under provisions of this Resolution for issuance of additional parity debt with the earnings test of 1.30 times maximum prospective debt service by net revenues, it provides that in the computation of this maximum on any short-term bonds, there may at the Authority's option be substituted for the debt service on the short-term bonds the debt service which would be payable if the short-term bonds were refunded by bonds having characteristics of 30 year with amortization to retire the bonds annually by the 30th year, and interest at 1½ times the rate on the short-term bonds. The A rating on the notes.

Current Developments:—Recent Data

(1) On 5-6-75, the Federal Highway Administrator served on the Authority a motion filed with the Administrator by a complainant for an order requiring the Authority to create an escrow account for the receipt of revenue derived from the 5-5-75 toll increases on the bridges and tunnels. The Administrator will decide whether to grant or deny this motion. In addition, the Administrator intends to conduct an investigation in complaints that the 1975 toll increases are unjust and unreasonable;

Plaintiff's Supplemental Exhibit F

(2) estimated total cost of the extension to the Port Authority Bus Terminal and expansion of Lincoln Tunnel approaches, including the cost of land but not the air rights development, is about $137,500,000. Bids for the first contract for the extension were authorized on 5-8-75;

(3) in 1972, PATH and Penn Central entered into a memorandum of intent under which PATH is to rehabilitate Penn Station in Newark. The memorandum and subsequent agreement is subject to approval of the U.S. District Court for the Eastern District of Pennsylvania which is administering the Penn Central reorganization proceedings. Rehabilitation is expected to take about 5 years at an estimated $12,300,000 cost;

(4) regarding the World Trade Center, construction is expected to be completed in stages through 1977, more than 75% of the Center's office space is occupied or under lease for occupancy as construction is completed, the total cost of the Center is now estimated at about $950,000,000 (Authority investment in the facility at 12-31-74 was about $807,789,000), and in addition to the portion of increased costs of the Center to be financed from the Series CC Notes, about $85,000,000 remains to be funded by the Authority in the future;

(5) on 5-14-75, the validity of the 1974 action repealing the 1962 covenant restricting Authority involvement in deficit mass transit operations was upheld by the Superior Court in New Jersey, Bergen County. The United States Trust Company, which began the action in 1974 on its own behalf and as trustee for two

Plaintiff's Supplemental Exhibit F

series of Consolidated Bonds, appealed the decision, and the appeal has been certified directly to the New Jersey Supreme Court.
On 6-17-74, United States Trust Company instituted a similar action in New York, in the Supreme Court, New York County, against the State of New York and the Attorney General of the State, which is still pending;

(6) to limit the potential excess marine terminal capacity in the Port of New York, the Authority and New York City entered into an agreement, approved by the Board of Estimate on 3-20-75 and subject to approval of the FMC, under which (a) the Authority and City agree for the 10-year period beginning 1-1-75 not to build container berths in addition to those now existing or under construction or firmly required by lease or other agreement by 1-1-75, except for the Red Hook project in Brooklyn; (b) during the 10-year period, Authority and City would not establish rental or berthing rates to return revenues below those required to meet the costs for the container berthing facilities; and (c) City and Authority shall cooperate in a joint program to create incentives for the attraction of new types of cargoes to the Port and for effective industrial utilization of waterfront property no longer suitable for handling of waterborne cargoes;

(7) the Authority has undertaken preparations to carry out the statutory programs of 1971 and 1974 regarding mass transportation and rail links to Kennedy and Newark International. In May 1975, the Authority filed an application with UMTA of the U.S. Department of Transportation for $277,600,000 to

Plaintiff's Supplemental Exhibit F

pay part of the cost of extending PATH from Newark to Plainfield. Local contribution for this part of the project totals $69,400,000, to be funded by the Authority from proceeds of future bond issues.
It is contemplated that PATH will enter into an agreement with New Jersey or a subsidiary corporation of the State under which PATH would acquire all needed property out of the proceeds of Authority bond sales and UMTA grants, and lease the property to the State or its subsidiary. The amount of rent to be paid by the State would depend mainly on the outcome of the litigation relating to the repeal of the 1962 covenant. This litigation will affect the extent to which the project or the State must cover debt service on the Authority's bonds issued for this project. Under arrangements to be approved by the ICC as needed, PATH's operating responsibility would be limited to managing the operation of the property for so long as the State or its subsidiary paid to PATH any required rental and the annual net operating costs and expenses directly attributable to the Newark-Plainfield line.

Facilities: Authority facilities comprise: (1) air terminals comprising John F. Kennedy International Airport, La Guardia Airport, Newark International Airport, and Teterboro Airport; (2) toll bridge and tunnels comprising the George Washington Bridge, Lincoln Tunnel, Holland Tunnel, Goethals Bridge, Bayonne Bridge, Outerbridge Crossing; (3) marine terminal facilities comprising Port Newark, Elizabeth Marine Terminal, Erie Basin Marine Terminal, Hoboken Marine Terminal, Brooklyn Marine Terminal, Columbia Street Marine Terminal, New York City Passenger Ship Terminal (dedicated 11-23-74); (4)

Plaintiff's Supplemental Exhibit F

World Trade Center; (5) PATH rail transit system; (6) other facilities comprising the Bus Terminal, George Washington Bridge Bus Station, Journal Square Transportation Center, Newark Union Motor Truck Terminal, New York Union Motor Truck Terminal, Downtown Heliport, West 30th Street Heliport.

Expansion program: (1) Regarding rail transportation and PATH, the off-street bus terminal at Journal Square Transportation Center in Jersey City opened in spring 1975, the Authority in 1974 applied for Federal funding for a 17.5-mile extension of PATH from its Newark terminus to Plainfield via Newark International and Elizabeth, and continued design and planning for direct rail service to Penn Station for Erie-Lackawanna commuter trains; (2) various air terminal projects at Kennedy International including new air cargo facilities. At Newark International's Terminal C construction originally scheduled for 1976 completion was deferred for 3 years and the north terminal is currently being remodeled for international traffic and Federal inspection. At Kennedy International, basic tenant leases of 1953 expired 9-30-74 and were extended to March 1976 to permit flexibility in lease negotiations; (3) expansion of the Manhattan bus terminal is planned; (4) World Trade Center, continued occupancy is anticipated with Authority reporting a working population of approximately 28,000 by end of 1974; a 20-story and 800-room hotel is expected to be built on the Center's site to be financed by private investors; (5) marine terminals, new passenger ship terminal is operated by the Authority under 20-year lease agreement with New York City; completion in 1974 of containership facilities at Elizabeth; expansion of container terminals at Port Newark; City-Authority agreement of 1974 provides for Authority construction of a con-

Plaintiff's Supplemental Exhibit F

tainer terminal in Red Hook section of Brooklyn; (6) planning for rail access project to Kennedy International from Manhattan.

Operations: The Authority's transportation facilities are important, and, like comparable facilities elsewhere, are subject to the same factors that can both favorably and unfavorably affect their usage. The commercial airports are important in the nation; FAA data for the 12 months through 6-30-74 reveals that Kennedy International recorded 305,756 air carrier operations, ranking it 4th in the Nation, La Guardia with 265,316 was ranked 6th, and Newark with 150,088 was 16th. Effects of higher air fares, the energy crisis, and recession affected air activity; domestic air passengers of 29.6 million were down 2.6% and international passengers of 10.7 million were down 9.3%. Kennedy International in 1974 accounted for 40.3% of total plant movements and 50.1% of passenger. Toll bridge and tunnel traffic in 1974 was 12.8% commercial, with George Washington Bridge accounting for 47.8% of total and Lincoln Tunnel for 20.7%. Toll revenues in 1974 accounted for 19.6% of total Authority operating revenues. At the marine terminals, those in New Jersey accounted for 58.1% of ship arrivals and 84.2% of general cargo tonnage.

Current Results: Revenues continue to be generated from all facilities sufficient to meet all requirements with a margin to spare. In 1974, current expenses rose at a lower rate than the increase in gross revenues, producing a 14.0% rise in net revenues. Debt service coverage narrowed, due to the inclusion in debt service of $200,000,000 of consolidated bonds issued during 1973. Balance sheet data reflect the growth of fixed assets, the retirement of debt, and the maintenance of reserves at required levels;

Plaintiff's Supplemental Exhibit F

reserves included $173.4 million in the general reserve and $46.8 million in the consolidated bond reserve. At the end of 1974, completed construction aggregated almost $3.0 billion, and comprised $1.1 billion for all the airports, $650 million for the Trade Center, $515 million for all the tunnels and bridges, $514 million for all the marine, bus, and truck terminals, and $185 million for rail facilities. Earnings for transportation projects should be aided by the higher bridge and tunnel tolls effective 5-5-75.

Historical key ratios:

	1972	1973	1974
Operating ratio (%)	62.2	63.3	62.0
Net take-down (%)	41.1	39.8	41.3
Interest coverage	3.61	3.16	2.73
Avg. annual debt sv. coverage	1.23	1.36	1.55
Interest safety margin (%)	29.9	27.3	26.2

Bonded Debt: At the end of 1974, the Authority had outstanding a total of $1,700,504,000 bonds, of which $1,668,584,000 represent 40 series of Consolidated Bonds issued since 1952, and the balance of the Authority's General and Refunding, Marine Terminal and Air Terminal bonds for which funds have been held in trust since the end of 1970 for their full and complete payment. Consolidated Bonds are payable from the net revenues of the Authority's facilities. Maximum annual principal and interest on outstanding bonds totals $118,398,000 in 1986, which is covered 1.51 times by net revenues in 1974. Also outstanding at the end of 1974 were $255,000,000 bank loans, due 1975 through 1979 and payable from revenue but subordinate to the payment of the Authority's bonds.

Plaintiff's Supplemental Exhibit F

	Years Ended December 31			% Change	
	1972	1973	1974	1973	1974
Operating Data:					
Toll bridges & tunnels:					
Traffic (000)	159,476	164,344	158,575	3.1	– 3.5
Toll revenue (000)	$ 80,620	$ 83,178	$ 80,613	3.2	– 3.1
Commercial airports:					
Plane movements	860,000	872,000	768,000	1.4	–11.9
Total passengers (000)	41,713	42,252	40,371	1.3	– 4.5
PATH passengers (000)	40,282	30,040a	37,700	–25.4	25.5
All marine terminals:					
Ship arrivals	3,979	3,877	3,601	– 2.6	– 7.1
General cargo, long tons (000)	12,183	12,617	13,405	3.6	6.2
Bus terminal passengers (000)		64,000	60,000		– 6.3

a. PATH on strike from 4-1-73 to 6-3-73.

	Years Ended December 31			% Change	
	1972	1973	1974	1973	1974
Financial results ($ in 000):					
Gross operating revenues	$319,835	$373,497	$410,412	16.8	9.9
Gross revenue and income	339,618	393,551	433,459	15.9	10.1
Oper. & maint. expenses	199,161	236,464	254,294	18.7	7.5
Net revenues	140,457	157,087	179,165	11.8	14.0
Interest on funded debt	38,856	49,729	65,562	28.0	31.8
Interest & mandatory redempt.	63,358	75,776	94,265	19.6	24.4
Times covered	2.22	2.07	1.90		
Safety margin (%)	22.7	20.7	19.6		

Plaintiff's Supplemental Exhibit F

	Years Ended December 31			% Change	
	1972	1973	1974	1973	1974
Balance sheet data ($ in 000):					
Invested in facilities	$3,047,507	$3,272,913	$3,447,056	7.4	5.3
Reserve balances:					
General reserve	156,681	173,487	173,487	10.7	0.0
Special reserve (a)	17,551	16,047	13,898	– 8.6	–13.4
Air terminal reserve(a)	27,489	22,664	18,660	–17.5	–17.7
Marine terminal reserve(a)	3,280	2,634	2,212	–19.7	–16.0
Consolidated bond reserve	7,101	21,932	46,800	208.9	113.4
Total reserves	212,102	236,764	255,057	11.8	7.5
Bonded debt:					
General & refunding bonds	15,852	14,586	12,658	–8.0	–13.2
Air terminal bonds	24,641	20,577	17,203	–16.5	–16.4
Marine terminal bonds	2,983	2,417	2,059	–19.0	–14.8
Consolidated bond	1,523,344	1,697,287	1,668,584	11.4	–1.7
Total bonded debt	1,566,810	1,734,867	1,700,504	10.6	–2.0
Bank loans	230,000	295,000	255,000	28.3	–13.6
Total long-term debt	1,796,810	2,029,867	1,955,504	13.0	–3.7

(a) Reserve funds maintained in trust for these bonds.

Plaintiff's Supplemental Exhibit F

MOODY'S INVESTORS SERVICE, INC.

MUNICIPAL CREDIT REPORT
PORT AUTHORITY OF NEW YORK AND NEW JERSEY

May 22, 1975

Ratings:	Consolidated Bonds	: A (confirmed)
	General and Refunding Bonds	: Aa (confirmed)
	Marine Terminal Bonds	: Aa (confirmed)
	Air Terminal Bonds	: Aa (confirmed)

Summary and Opinion: This bi-state agency maintains earning capability to meet requirements and to service its Consolidated Bonds within reasonable margins. Net revenues from the airports, marine terminals, and toll bridges and tunnels more than offset deficits of the PATH commuter rail system and the World Trade Center at this time.

The Superior Court in New Jersey has upheld New Jersey legislation that repealed the 1962 covenant restricting Authority involvement in deficit mass transit operations. This decision is a matter of deep concern to bondholders generally, and the decision will be appealed. The effect on the Authority cannot be determined at this time in absence of a definite plan for financing mass transit projects and facilities deemed to be non-self-sustaining. In the meantime, earnings of the present facilities are good, reserves for debt service continue strong, and recent toll increases have further strengthened financial position at this time.

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Plaintiff's Supplemental Exhibit F

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Plaintiff's Supplemental Exhibit F

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Plaintiff's Supplemental Exhibit F

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Plaintiff's Supplemental Exhibit F

	12-31-72	12-31-73	12-31-74	% Change 1973	% Change 1974
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(a) Reserve funds maintained in trust for these bonds.

Plaintiff's Supplemental Exhibit G

MOODY'S REPORT
RE STATE OF NEW JERSEY
DATED JUNE 23, 1975

MOODY'S INVESTORS SERVICE, INC.
MUNICIPAL CREDIT REPORT
©MOODY'S INVESTORS SERVICE, INC.

June 23, 1975

STATE OF NEW JERSEY

Rating: Aa (revised from Aaa)

New Jersey's budget for 1975-76 as adopted includes a sizeable deficit, which is not covered. The State also is mandated by its Supreme Court to establish a new school financing plan. The existing school financing system has been ruled unconstitutional. The Court's initially imposed deadline for school finance reform has passed and has been extended in recognition of the size of the problem.

The State's need for a broad-based tax has been debated for many years. Against this has been put its levels of services, which critics have maintained are substantially below standards provided by other high-income states. The plight of localities in the State, has been cited as a need for improvement of the revenue system.

In a sense, these criticisms are irrelevant to the bondholder. The State's method of finance and the levels of service it provides are the concern of the State and its voters. The bondholder does have an interest in the maintenance of a functioning entity that will continue itself.

It is clear that the State has pressing revenue needs for both its immediate purposes and for school financing. By any measure New Jersey is one of the nation's wealthiest

Plaintiff's Supplemental Exhibit G

states. But it has difficult problems right now. Unemployment is high, the economy is temporarily stagnant, and tax revenues are showing little or no growth.

At the same time the State has taken actions which are puzzling to bondholders. It committed itself to a deficiency makeup for the capital reserve fund of the New Jersey Sports and Exposition Authority, a "moral obligation" type arrangement which very likely will call on the State. And the State through its legal machinery repealed a covenant it had authorized with bondholders in connection with bond issues of the Port Authority of New York and New Jersey. As a matter of logic and as a matter of concern to the investment community, these actions certainly appear contradictory and raise a further question. Does the State follow any kind of consistent policy.

The level of State debt is not high. Good security is provided for the bonds. Top bond ratings reflect other factors, however, the current policy of the State in facing its revenue problems and its general bonding program is open to serious doubt about its ability to be decisive in face of need. Wealth which cannot be tapped to meet present needs raises doubt about its usage in future debt servicing. The extension of current financial difficulties into capital financial problems is an inevitable step, if the current financial difficulties are not solved when they arise.

Because of our doubts about the decision making process in the State at this time, its ability to act decisively to solve visible problems, we can no longer assign it our top rating. All of the State's obligations are revised to *Aa*.

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Excerpts From The Port Authority of N. Y. & N. J.

1975 Annual Report

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"THE PORT AUTHORITY YEAR

Economic viability of the Port District and further development of public transportation facilities in the region were the central themes of Port Authority activity in 1975.

Despite the New York-New Jersey region's deep fiscal difficulties, complicated by a declining population, uncertain employment forecasts and unanswered questions of federal financing, the Port Authority dedicated one major mass transportation project this year and started construction on another, one on each side of the Hudson River. The PATH Journal Square Transportation Center, dedicated October 16, is now in full operation in Jersey City as one of the largest public transportation facilities in the nation and as a national prototype of a bus-rail-car multimodal project. In midtown New York, at the Port Authority Bus Terminal, celebrating its 25th year as the busiest mass transportation center in the world, a ceremony on September 11 marked the start of construction to modernize and extend it. The new unified structure will increase capacity by approximately 50 percent.

The Port Authority also continued its program of improving its air, marine, bus and truck terminals, and its public transportation and world trade facilities that already serve the New York-New Jersey Port District.

To finance the bus terminal construction and to prepare to finance other mass transportation projects, as well as to weight the individual traveler's choice in favor of public transportation, the Port Authority made an historical revision to one of its key revenue sources. On May 5, for the first time in 48 years, the tolls on its tunnels and bridges

were increased by approximately 50 percent for all except buses and those who form carpools. (At year-end, a proceeding was pending before the Federal Highway Administrator to determine the reasonableness and justness of the new toll schedule under applicable federal law.)

The major rail transportation project to extend PATH into the Plainfield Corridor, for which the State of New Jersey and PATH had submitted a grant application for $278 million in federal aid, was rejected "without prejudice" by the Urban Mass Transportation Administrator on December 19. By year end the New Jersey Department of Transportation and the Port Authority were investigating new proposals and courses of action to achieve the necessary federal funding.

Federal funding is also necessary for the rail improvement program authorized by the states in 1972 and 1973 to provide direct rail service to Penn Station, New York by connecting Erie Lackawanna Railway tracks to the Penn Central's. Planning, design and engineering studies for the project, conducted by the Port Authority, progressed toward completion in 1975.

No formal applications for federal aid had yet been made for the Kennedy International Airport rail link to Manhattan, pending a full financial determination of how the project can be supported. In the meantime, contract plans and specifications have been completed for all off-airport work and for cross-airport rail alignment into the airport's central terminal area. Functional planning and preliminary engineering design have also been completed for Penn Station, New York, and for the airport's rail terminal.

The Port Authority also sought low capital intensive methods of achieving improvements to existing transportation facilities, in accordance with national goals. In

the past year the Port Authority engaged in the promotion of carpooling through computer matching, completed plans for permanent traffic controls on the Exclusive Bus Lane and organized the expansion of the Staggered Work Hours Program where applicable in the Port District.

The Port Authority worked throughout the year with the federal agencies, ConRail and others involved in the reorganization of the northeast railroads to formulate operating plans favorable to the Port District and to ensure meaningful rail competition in the region.

To contribute to the solution of regional problems, the Port Authority participated in the activities of such boards and commissions as:

> ... The New Jersey Capital Needs Commission to evaluate the long-term capital needs of the state.
>
> ... The New Jersey Economic Recovery Commission, concerned with recommendations for stimulating the state economy.
>
> ... New York's Task Force on Unemployment to develop methods of reducing the state's unemployment.
>
> ... The Staggered Work Hours Program which, primarily with Port Authority initiative, was developed in Lower Manhattan and expanded into midtown Manhattan.

Federal, state and municipal governments sought the Port Authority this year in increasing recognition of its technical planning and engineering assistance as a major community resource:

> ... At the request of New York City, in anticipation of the introduction of new passenger ferries, the Port Authority proposed ways to improve the commuter passenger flow through the Staten Island-Manhattan ferry

terminals, short of the costly alternative of reconstruction.

. . . The Port Authority is preparing the environmental impact statement and engineering design work for the proposed Liberty State Park, at the request of the New Jersey Environmental Protection Agency.

. . . The Federal Aviation Administration and the Federal Maritime Administration have enlisted Port Authority assistance to determine for the former the effects of reduced nighttime operations if they were to be imposed at airports and, for the latter, to assess the impact of ports on the economy and commerce of the nation.

. . . In cooperation with the Hackensack Meadowlands Development Commission, the Port Authority is preparing a report on the transportation facilities needed to connect the Hackensack Meadowlands with Manhattan and other regional centers."

• • •

"PATH

The Journal Square Transportation Center, situated on an eight-acre site in the heart of Jersey City and now serving 74,000 PATH and bus passengers each weekday, comprises a new PATH rail rapid transit station with capacity for longer trains, an off-street bus station, an auto parking garage, the PATH Administration Building and a new Operations Control Center for the PATH rail system. The new bus station, operated by the Terminals Department, was opened in April, and the two-level parking garage above the bus station, with 618 parking spaces for commuters and shoppers, opened in September. Portions of the new PATH station had been opened in 1973 and the PATH Administration Building in 1974.

Built by PATH at a cost of $87 million, over $39 million of which constitutes grants from the Urban Mass Transportation Administration, the center was designed as the focal point of Jersey City's plan for the revitalization of the Journal Square commercial area. An open house held October 18 in celebration of the center's dedication brought an estimated 10,000 people from the surrounding community and the wish of Jersey City's mayor that a municipal services fair, held in the center in conjunction with the dedication, become an annual event. The center's plaza has already been used as a site for public assembly.

PATH carried over 38 million passengers in 1975, representing over 70 percent of New Jersey passengers entering New York City by rail.

PATH's operation was conducted with an on-time system record of 97.6 percent for the year.

The Port Authority has now invested over $251 million in the acquisition, rehabilitation and modernization of the 14-mile rail system. Cumulative operating deficits, calculated in accordance with interstate Commerce Commission regulations, totaled nearly $220 million since 1962."

• • •

"TERMINALS

Construction began in September on a four-year $160 million project to expand the Port Authority Bus Terminal by about 50 percent to meet a traffic volume now exceeding 200,000 commuter and long-distance bus passengers a day, arriving and departing on 7,000 buses."

• • •

"PORT AUTHORITY FINANCE

Basic Policies and Financial Structure

The States of New Jersey and New York directed the Port Authority . . . "to proceed with the development of the Port of New York . . . as rapidly as may be economically practicable . . ." The Port Authority, however, may not levy taxes or assessments or pledge the credit of either state or any municipality. Its program of public works was to be supported and financed by the private sector, and to this end the two states pledged their "cordial cooperation . . . in the encouragement of the investment of capital . . ." Over the years nearly $4 billion of Port Authority obligations have been purchased by investors, of which $1.8 billion was outstanding at December 31, 1975.

The statutes establishing the General Reserve Fund of the Port Authority provide for the pooling of revenues to the end that older facilities with established earning power can aid new projects during development periods until they reach their anticipated point of self-support. These statutes provide for the utilization of available net revenues to maintain the General Reserve Fund at the prescribed amount of 10 percent of the total par value of the Port Authority's outstanding bonds.

The Port Authority's long-established policy is to retire debt as rapidly as sound financial management permits and to maintain, at year-end, a combined amount in its reserve funds, including reserve funds in trust, equal to at least the amount of the next two years' mandatory bonded debt service. Acceleration of debt retirement before mandatory dates may be accomplished out of the General Reserve Fund only to the extent that reserve funds exceed the ensuing two years' mandatory bonded debt service.

Bonds for an additional facility cannot be issued with a pledge of the General Reserve Fund unless the Port Authority Commissioners certify to investors that the issuance of the bonds or that such pledge will not materially impair the sound credit standing of the Port Authority, the investment status of its bonds, or its ability to fulfill its commitments and undertakings.

In 1974, the Legislatures of New York and New Jersey repealed a statutory covenant with holders of affected Port Authority bonds which permitted deficit financing of passenger railroad facilities in addition to the Hudson Tubes (Port Authority Trans-Hudson [PATH] System) only within specified financial limits. The covenant was originally adopted in 1962 as part of the statutes authorizing Port Authority acquisition of the interstate Hudson and Manhattan Railroad. In 1973, the two states had enacted legislation to preclude application of the statutory covenant to the holders of obligations issued by the Port Authority after May 10, 1973.

In April 1974, the United States Trust Company of New York instituted litigation in New Jersey as Trustee for the 40th and 41st Series of the Port Authority's Consolidated Bonds, as the holder of a significant amount of outstanding obligations of the Port Authority, and as a class representative on behalf of the holders of all outstanding Consolidated Bonds and all others similarly situated against the State of New Jersey and its Governor and Attorney General seeking a declaratory judgment that the action taken by the states in 1974 to repeal the 1962 statutory covenant violates the federal and state Constitutions. This action was consolidated with another pending action in New Jersey instituted by private parties seeking to invalidate the statutory covenant.

Excerpts From The 1975 Port Authority Annual Report

On February 25, 1976, the New Jersey Supreme Court affirmed the decision of the New Jersey Superior Court rendered in May 1975, which had decided that the repeal was a valid exercise of the police power of the states and not a violation of the contract clauses of the United States Constitution or the Constitution of the State of New Jersey. The United States Trust Company has announced that it plans to appeal to the United States Supreme Court from the decision of the Supreme Court of New Jersey."

• • •

"RESERVE FUNDS

At year-end 1975, the General Reserve Fund balance was $176,457,000 and continued to meet the prescribed statutory amount, while the Consolidated Bond Reserve Fund totaled $62,409,000.

These balances, together with other reserve fund balances in trust totaling $28,100,000, continued to meet the long-established policy of maintaining total reserve funds in an amount equal to at least the next two years' mandatory debt service on bonded debt (excluding scheduled debt service on outstanding bank loans as detailed in Note C, Page 29)."

• • •

Excerpts From The 1975 Port Authority Annual Report

STATEMENT OF INCOME

	Year Ended December 31,	
	1975	1974*
	(In Thousands)	
Gross Operating Revenues	$458,406	$410,412
Operating Expenses (Note E)	(289,138)	(252,037)
Depreciation	(83,281)	(78,214)
Income from Operations	85,987	80,161
Financial Income and Expense:		
Income on investments	20,965	21,228
Gain on purchase of Port Authority bonds	8,283	4,880
Security valuation adjustment	2,453	(3,061)
Interest on bonded debt	(72,249)	(66,390)
Interest on bank loans	(8,464)	(9,119)
Net Income	$ 36,975	$ 27,699

* Restated, See Note E

Excerpts From The 1975 Port Authority Annual Report

STATEMENT OF CHANGES IN FINANCIAL POSITION

	Year Ended December 31, 1975	1974*
	(In Thousands)	
Funds provided from:		
Net Income	$ 36,975	$ 27,699
Depreciation	83,281	78,214
Funds provided by operations	120,256	105,913
Consolidated Notes	100,000	—
Government Contributions in Aid of Construction	19,105	18,606
Net Change in Other Assets and Deferred Credits	21,753	—
Total Funds Provided	261,114	124,519
Funds applied to:		
Cost of Facilities	138,548	174,108
Retirement of Bonded Debt	35,930	34,363
Repayment of Bank Loans	55,000	40,000
Net Change in Other Assets and Deferred Credits	—	16,119
Net Reduction in Accounts Payable and Other Liabilities	3,912	8,754
Planning Expenditures Applicable to Future Years	2,493	4,238
Total Funds Applied	235,883	277,582
Net Increase (Decrease) in Cash and Investments	$ 25,231	$(153,063)

* Restated, See Note E

See Notes to Financial Statements

Excerpts From The 1975 Port Authority Annual Report

STATEMENT OF FINANCIAL POSITION

	December 31, 1975				December 31, 1974*
	Operating Fund	Capital Fund	Reserve Funds	Combined Total	Combined Total
	(In Thousands)				
Assets					
Facilities, at Cost (Note B)	$ —	$3,527,430	$ —	$3,527,430	$3,388,901
Less Accumulated Depreciation	—	751,002	—	751,002	667,740
Facilities, Net	—	2,776,428	—	2,776,428	2,721,161
Investment in Securities (Schedule D)	18,796	29,289	264,297	312,382	262,877
Cash and Time Deposits	24,971	38,898	2,669	66,538	90,812
Other Assets	91,250	2,349	—	93,599	111,550
Total Assets	135,017	2,846,964	266,966	3,248,947	3,186,400
Liabilities					
Bonded Debt (Schedule E)	—	1,764,574	—	1,764,574	1,700,504
Bank Loans Payable (Note C)	—	200,000	—	200,000	255,000
Accounts Payable and Other Liabilities	111,984	33,632	—	145,616	149,528
Deferred Credits to income	7,839	—	—	7,839	6,530
Total Liabilities	119,823	1,998,206	—	2,118,029	2,111,562
Net Assets	$ 15,194	$ 848,758	$266,966	$1,130,918	$1,074,838

*Restated, See Note E

Excerpts From The 1975 Port Authority Annual Report

STATEMENT OF CHANGES IN NET ASSETS

	Year Ended December 31, 1975				Year Ended December 31, 1974*
	Operating Fund	Capital Fund	Reserve Funds	Combined Total	Combined Total
	(In Thousands)				
Balance at January 1 ..	$ 12,777	$ 807,004	$255,057	$1,074,838	$1,028,533
Contributions from Federal and State Agencies in Aid of Construction	—	19,105	—	19,105	18,606
Distribution of Net Income:					
Capital Fund Balance Less Depreciation on Assets Acquired with Government Contributions	—	26,344 (3,695)	—	22,649	7,149
Self-Insurance	2,417	—	—	2,417	2,257
Reserves	—	—	11,909	11,909	18,293
Net Income				36,975	27,699
Balance at December 31	$ 15,194	$ 848,758	$266,966	$1,130,918	$1,074,838

*Restated, See Note E

See Notes to Financial Statements

* * *

Excerpts From The 1975 Port Authority Annual Report

SCHEDULE A—REVENUES AND RESERVES

(In accordance with Port Authority bond resolutions)

	Year Ended December 31,			
	1975			1974*
	Operating Fund	Reserve Funds Schedule C	Combined Total	Combined Total
	(In Thousands)			
Gross Operating Revenues	$458,406	$ —	$458,406	$410,412
Operating Expenses	289,138	—	289,138	252,037
Net Operating Revenues	169,268	—	169,268	158,375
Financial Income				
Income on investments (includes gain of $8,283,000 in 1975 and $4,880,000 in 1974 on purchase of Port Authority bonds)	4,091	25,157	29,248	26,108
Security valuation adjustment	62	2,391	2,453	(3,061)
Net Revenues Available for Debt Service and Reserves	173,421	27,548	200,969	181,422
Debt Service				
Interest on bonded debt....	71,552	697	72,249	66,390
Serial maturities and sinking fund retirements	30,055	5,875	35,930	34,363
Interest on bank loans	—	8,464	8,464	9,119
Payment of bank loans	—	55,000	55,000	40,000
Total Debt Service	101,607	70,036	171,643	149,872
Appropriation to Invested in Facilities	—	15,000	15,000	11,000
Appropriation to Self-Insurance	—	2,417	2,417	2,257
Transfers to Reserves	$(71,814)	71,814	—	—
Net Increase in Reserves		11,909	11,909	18,293
Reserve Balances—Beginning of Year		255,057	255,057	236,764
Reserve Balances—End of Year (Schedule C)....		$266,966	$266,966	$255,057

* Restated, See Note E

See Notes to Financial Statements

Excerpts From The 1975 Port Authority Annual Report

Schedule F

BONDED DEBT AMORTIZATION 1976-2008

December 31, 1975 (In Thousands)

	Debt Service Total All Issues			Amortization			
	Par Value $1,764,574						
Year	Total	Interest	Amortization	Consolidated Bonds	General and Refunding Bonds	Air Terminal Bonds	Marine Terminal Bonds
1976	$121,903	$85,786	$36,117	$29,294	$1,033	$4,955	$835
1977	121,197	84,723	36,474	30,244	1,194	4,519	517

See Notes to Financial Statements

Excerpts From The 1975 Port Authority Annual Report

Schedule G

SELECTED FINANCIAL DATA

(In accordance with Port Authority bond resolutions)

	1975	1974*	1973*
		(In Thousands)	
REVENUES AND EXPENSES			
Gross Operating Revenues	$ 458,406	$ 410,412	$ 373,497
Operating Expenses	289,138	252,037	234,475
Net Operating Revenues	169,268	158,375	139,022
Income on Investments	20,965	21,228	16,806
Gain on Purchase of Port Authority Bonds	8,283	4,880	6,809
Security Valuation Adjustment	2,453	(3,061)	(3,591)
Net Revenues Available for Debt Service and Reserves	200,969	181,422	159,046
DEBT SERVICE—OPERATIONS			
Interest on Bonded Debt	(71,552)	(65,562)	(49,729)
Times, Interest Earned	2.81	2.77	3.20
Serial Maturities and Sinking Fund Retirements	(30,055)	(28,703)	(26,047)
Times, Debt Service Earned	1.98	1.92	2.10
DEBT SERVICE—RESERVES			
Debt Service on Bonds Secured by Trusts	(6,572)	(6,488)	(6,874)
Interest on Bank Loans	(8,464)	(9,119)	(6,775)
Bank Loan Payments	(55,000)	(40,000)	(35,000)
Appropriation to Invested in Facilities—Reserves	(15,000)	(11,000)	(8,000)
Appropriation to Self-Insurance —Reserves	(2,417)	(2,257)	(1,959)
Net Increase in Reserves	11,909	18,293	24,662
RESERVE BALANCES			
Beginning of Year	255,057	236,764	212,102
End of Year	$ 266,966	$ 255,057	$ 236,764

Excerpts From The 1975 Port Authority Annual Report

	1975	1974*	1973*
		(In Thousands)	
Represented By:			
General Reserve	$ 176,457	$ 173,487	$ 173,487
Special Reserve (A)	12,767	13,898	16,047
Air Terminal Reserve (A)	13,576	18,660	22,664
Marine Terminal Reserve (A)	1,757	2,212	2,634
Consolidated Bond Reserve	62,409	46,800	21,932
Total	$ 266,966	$ 255,057	$ 236,764
DEBT—AT YEAR-END			
General and Refunding Bonds	$ 11,717	$ 12,658	$ 14,586
Air Terminal Bonds	12,671	17,203	20,577
Marine Terminal Bonds	1,657	2,059	2,417
Consolidated Bonds and Notes	1,738,529	1,668,584	1,697,287
Total Bonded Debt	1,764,574	1,700,504	1,734,867
Bank Loans	200,000	255,000	295,000
Total	$1,964,574	$1,955,504	$2,029,867
INVESTED IN FACILITIES—AT YEAR-END	$3,581,037	$3,442,489	$3,268,381
DEBT RETIREMENT THROUGH REVENUES AND RESERVES			
Annual	$ 90,930	$ 74,363	$ 66,943
Cumulative	$1,426,650	$1,335,720	$1,261,357

NOTE: These combined totals are presented for general information purposes only and are not intended to reflect specific applications of the revenues and reserves of the Port Authority, which are governed by statutes and its bond resolutions.

(A) Reserve Funds maintained in Trust since December 31, 1970. See Note H of Notes to Financial Statements.

* Restated, See Note E.

See Notes to Financial Statements

Excerpts From The Port Authority of New York and New Jersey

OFFICIAL STATEMENT

$100,000,000

CONSOLIDATED BONDS

Forty-second Series, Due 2011

(First Installment)

The date of this Official Statement is July 8, 1976

THE PORT AUTHORITY OF NY & NJ

OFFICIAL STATEMENT

"TO PROSPECTIVE PURCHASERS:

The Port Authority of New York and New Jersey is offering for sale, upon an all or none basis, $100,000,000 of its Consolidated Bonds of the Forty-second Series, First Installment, Due 2011. The purpose of this Official Statement is to describe the bonds being presently offered and to give other pertinent data with respect to the Authority and its finances.

The Present Offering

The following is a summary description of the bonds being presently offered for sale.

Series: Consolidated Bonds, Forty-second Series, Due 2011.

Principal Amount: $100,000,000.

Dated: July 15, 1976.

Due: July 15, 2011.

Excerpts From The Port Authority of New York and New Jersey Official Statement

Purposes: The proceeds shall be used for purposes of capital expenditures in connection with the Authority's facilities, as follows: bridges and tunnels; docks and wharves; airport terminal and service buildings, roadways, runways, taxiways and fuel and utility service and distribution systems; bus terminals; the Hudson Tubes portion of the Port Authority Trans-Hudson system; parking facilities; storage or training facilities directly related to any of the foregoing; and the World Trade Center; and for refunding all or any part of Consolidated Notes, Series BB, previously issued; provided, however, no more than 10% of the amount of such proceeds not expended to refund any Consolidated Notes, Series BB, shall be used for the purpose of capital expenditures in connection with the World Trade Center and those integral portions of an extension to the Port Authority Bus Terminal related to any future construction above such extension." (p.1) • • •

"In 1962 the two States authorized the Port Authority to proceed with the acquisition, rehabilitation and operation of the Hudson Tubes, consisting of the properties formerly operated by the Hudson & Manhattan Railroad Company, and certain extensions to the Hudson Tubes; also the States authorized a new facility of commerce known as the World Trade Center. These statutes were amended during 1972-1974 to authorize the Authority to effectuate an extension of the Hudson Tubes from the City of Newark to the vicinity of the City of Plainfield in New Jersey and to undertake a series of New Jersey rail improvements with respect to direct Erie-Lackawanna railroad service into Pennsylvania Station in New York City. The amendments also provided for the repeal of the provisions of the statutory covenant contained in the 1962 legislation limiting the Port Authority's financial participation in additional deficit passenger

Excerpts From The Port Authority of New York and New Jersey Official Statement

railroad facilities. (See pp. 9-10, 17-22.) Neither Consolidated Bonds, Forty-second Series, maturing on June 1, 2011, nor any prior issue of Authority obligations provide proceeds for additional deficit passenger railroad facilities. No representation is made herein as to the application of proceeds of future issues of Authority obligations.

The Authority raises the necessary funds for the construction or acquisition of its facilities upon the basis of its own credit, its reserve funds and its future revenues. In the past such funds have been supplemented in certain cases by state and federal contributions. The Authority has no power to levy taxes or assessments. Its bonds and other obligations are not obligations of the two States or of either of them, and (except for State Guaranteed Commuter Car Bonds described on p. 23) they are not guaranteed by the States or either of them. The revenues of the Authority are derived principally from the tolls, fares, landing, dockage, rental and other charges for the use of and privileges at its various facilities hereinafter described." (p. 4) • • •

"TUNNELS AND BRIDGES

The Port Authority operates all the interstate vehicular tunnels and bridges in the Port of New York District. Each of the tunnels and bridges accommodates both east-bound and west-bound traffic. For purposes of efficiency and economy in collection, tolls are collected from east-bound traffic only.

Effective May 5, 1975 the Port Authority revised its toll schedules for its six interstate vehicular crossings. The revisions included a general 50% increase in tolls for automobiles, trucks and tractor trailers, a 100% increase in the cost of 30-day commutation tickets, the institution of

special car pool ticket books which provide for a two-thirds discount from the new passenger car rate, and the elimination of ticket books previously good for two years and which provided for a 20% discount; the sale of toll scrip was continued at the 10% discount and bus tolls were retained at the pre-existing rate. It is estimated that these revisions will result in additional toll revenues to the Authority of more than $40,000,000 per year. These increased toll revenues are expected to enhance the Authority's ability to undertake additional mass transportation projects as noted on page 22.

On April 25, 1975, after receiving complaints in accordance with the Federal Bridge Toll Procedural Rules of the United States Department of Transportation, the Federal Highway Administrator commenced an investigation which will include a public hearing to determine whether the toll increases on the Port Authority's four interstate bridges are just and reasonable within the meaning of Section 4 of the Federal Bridge Act of 1906. (See *"Rate Powers and Covenants"*, p. 29). On May 6, 1975, the Federal Highway Administrator served on the Authority a copy of a motion filed with the Administrator by one of the complainants for an order requiring the Authority during the pendency of the toll proceeding to create an escrow account for the receipt of revenue derived from the toll increase. On May 23, 1975, the Authority filed a memorandum in opposition to that motion, and the decision on the motion is still pending. The Authority has taken the position that such an escrow account is not necessary, desirable or authorized.

The Federal Highway Administration issued a Notice of Proposed Rule Making on July 18, 1975, to govern bridge toll review procedures which would require 90-day advance

notice of a proposed toll increase and would also require the escrow of all toll increase revenues upon the commencement of any proceeding to determine the justness and reasonableness of a toll increase." (pp. 5-6) • • •

"New Airport and Mass Transportation Legislation

During 1971-74, the Legislatures of New York and New Jersey enacted legislation (Ch. 474 and Ch. 475, Laws of N. Y. 1971; Ch. 1003, Laws of N. Y. 1972; Ch. 317 and Ch. 318, Laws of N. Y. 1973; Ch. 993, Laws of N. Y. 1974 and Ch. 245, Laws of N. J. 1971; Ch. 207 and Ch. 208, Laws of N.J. 1972; Ch. 25, Laws of N. J. 1974) amending the 1947 statutes providing for the regional development of air terminals by the Port Authority and amending the 1962 statutes providing for the financing and effectuation by the Port Authority of a port development project consisting of the Hudson Tubes, the Hudson Tubes extensions and the World Trade Center to provide, in addition, for mass transportation access to John F. Kennedy International and Newark International Airports.

The bi-State legislation specifically provides for the Port Authority to undertake separately, pursuant to the air terminal statutes, railroad lines (a) connecting Newark International Airport to existing rail and terminal facilities in the City of Newark, and (b) connecting John F. Kennedy International Airport to the main line of the Long Island Rail Road in the County of Queens, including a spur or branch to the Montauk line of the railroad in that County. The Authority is also specifically authorized to undertake in connection with each of the projects: (1) appropriate mass transportation terminal facilities at and within the two airports, (2) suitable offsite facilities for the accommodation of air passengers, baggage, mail, express, freight

and other users of the connecting facilities, and (3) such additional rail or other mass transportation, terminal, station, parking, storage and service facilities, including improvements to the railroad approaches at Pennsylvania Station and Jamaica Station in the City of New York in connection with the New York project, as operations may require.

The statutes which authorize rail access to John F. Kennedy International Airport and Newark International Airport each contain the following legislative finding:

> "Such mass transportation facilities can properly be regarded as constituting a part of each air terminal, the development of which should be the responsibility of those charged with the duties of air terminal development."

The statutes amended the definition of "air terminals" to provide that:

> "It shall also mean facilities providing access to an air terminal, consisting of rail, rapid transit or other forms of mass transportation which furnish a connection between the air terminal and other points in the port district, including appropriate mass transportation terminal facilities at and within the air terminal itself and suitable offsite facilities for the accommodation of air passengers, baggage, mail, express, freight and other users of the connecting facility."

A conclusive determination that facilities providing access to air terminals are legally part of such terminals as set forth in the foregoing findings of the legislation author-

izing rail access to John F. Kennedy and Newark International Airports and that rail access projects may be financed on such basis, would preclude, regardless of the outcome of the litigation referred to at pages 18-19 above, applicability to such financing of the provisions of the 1962 statutory covenant relating to the certification of the projects by the Port Authority as self-supporting thereunder.

The 1971-1974 legislation also authorizes the Port Authority to undertake as Hudson Tubes extensions passenger railroad facilities extending from Pennsylvania Station in the City of Newark over new rail transit lines or on or over the existing rail transit lines of other railroads, to the vicinity of the City of Plainfield in the State of New Jersey, including construction, reconstruction and improvement of necessary stations in and between the City of Newark and the vicinity of the City of Plainfield together with such additional rail or other mass transportation, terminal, station, parking, storage and service facilities as operations may require, including a connection to provide improved access to Newark International Airport if and to the extent such connection shall not be otherwise provided as air terminal facilities for the airport.

In October, 1974, a joint Task Force of the New Jersey Department of Transportation and the Port Authority was established at the request of the Urban Mass Transportation Administration of the U. S. Department of Transportation to study potential transit alternatives in the Newark-Plainfield corridor. The Task Force submitted an interim report on January 15, 1975 to Governor Brendan T. Byrne of New Jersey. The report assessed in detail without recommendation five transit alternatives in the Union County corridor, as well as various plans for transit access to Newark International Airport. Subsequently,

Governor Byrne announced his view that the Authority should proceed with an extension of the PATH system to Plainfield via the City of Elizabeth. On February 10, 1975, the final report was transmitted to the Urban Mass Transportation Administration.

The 1971-1974 legislation also authorizes the Authority to undertake certain improvements to passenger railroad lines connecting with the Hudson Tubes to provide direct rail service into Pennsylvania Station in the City of New York by the Erie Lackawanna railroad and to upgrade existing Penn Central rail service into the Station. The new improvements would include three direct track connections between the rail transit lines of the Erie Lackawanna and the Penn Central railroads in the vicinity of the Towns of Kearny and Secaucus in the State of New Jersey; replacement of a railroad bridge operated by Penn Central railroad across the Hackensack River; a new passenger railroad equipment yard in the vicinity of the Town of Secaucus; improvements to Penn Station in the City of New York and to its New Jersey approaches as necessary or desirable to improve operations and to increase train and passenger handling capacity; and such additional rail or other mass transportation, terminal, station, parking, storage and service facilities as operations may require. The railroads involved are now part of the Consolidated Rail Corporation (ConRail) system.

Finally, the legislation adopted in 1974 provides for the repeal of the statutory covenant between the two States and affected bondholders limiting the Port Authority's ability to participate in deficit passenger railroad projects. The legislation adopted in 1972-1973 had provided that the covenant shall not apply to the holders of bonds thereafter

issued by the Port Authority, including bonds of the present offering (see p. 17).

The Port Authority has undertaken active preparations to carry out the statutory programs. In May, 1975, it filed an application with the Urban Mass Transportation Administration of the U.S. Department of Transportation (UMTA) for $277,600,000 to pay part of the cost of extending the PATH system to Plainfield. The local contribution for this part of the project totals $69,400,000, to be funded by the Port Authority from the proceeds of a future bond issue or issues. It is contemplated that the Port Authority Trans-Hudson Corporation (PATH) would enter into an agreement with the State of New Jersey or a subsidiary corporation of the State under which PATH would acquire all necessary real and personal property out of the proceeds of Port Authority bond sales and UMTA grants, and lease said property to the State or its subsidiary. The amount of rent to be paid by the State would depend primarily on the outcome of the litigation relating to the repeal of the statutory covenant (see *"Litigation"*, pp. 18-19). That litigation will affect the extent to which the project or the State must cover debt service on the Port Authority's bonds issued for the project. Under these arrangements, PATH's operating responsibility would be limited to managing the operation of the property for so long as the State or its subsidiary paid to PATH any required rental and the annual net operating costs and expenses directly attributable to the Newark-Plainfield line. On December 19, 1975, the Urban Mass Transportation Administration rejected the application, as filed, for Federal aid for this project. This decision is currently being reconsidered by the Urban Mass Transportation Administration which has requested and received addi-

tional information with respect to this PATH extension and other New Jersey mass transportation projects.

After consultation with Governor Byrne of New Jersey and Governor Carey of New York, the Chairman of the Authority has noted that the revision to the Port Authority bridge and tunnel toll schedules which was effective May 5, 1975, is expected to result in additional revenues to the Authority of more than $40,000,000 per year (see *"Tunnels and Bridges"*, pp. 5-6) and that these additional revenues could support $400,000,000 in capital improvements in mass transportation projects authorized for Port Authority participation; $160,000,000 allocated to the extension of the Port Authority Bus Terminal now under construction (see pp. 8-9), with the remaining $240,000,000 to be allocated on the basis of $120,000,000 for authorized mass transportation projects in each State, in accordance with priorities established by responsible State officials and the Commissioners of the Port Authority acting pursuant to legislative authorization and commitments to the holders of Port Authority obligations." (pp. 21-22) • • •

Supreme Court, U. S.
FILED
AUG 12 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port of Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of The State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

VOLUME II

Pages 529a—1149a

FILED MAY 21, 1976

PROBABLE JURISDICTION NOTED JUNE 28, 1976

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SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—BERGEN COUNTY

STIPULATION

UNITED STATES TRUST COMPANY
OF NEW YORK, etc.
v.
THE STATE NEW JERSEY, et al.

The undersigned hereby stipulate, for the purposes of this action only, and subject to objections as to relevance, that the following statements are true and admissible into evidence.

I. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

1. By virtue of Chapter 130 of the Laws of New Jersey of 1917 and Chapter 426 of the Laws of New York of 1917, the two States established study commissions to cooperate in making a thorough investigation of the conditions of the Port of New York, to submit a comprehensive report recommending the proper policy to be pursued for the best interest of the entire Port of New York, and to determine the legislation, State and Federal, necessary to make such recommendations effective "to the end that said Port shall be efficiently and constructively organized and furnished with modern methods of piers, rail and water freight, and adequately protected in the event of war."

2. The two State Commissions thereafter organized themselves into a single body known as the New York, New Jersey Port and Harbor Development Commission (the "Commission"). On December 16, 1920, the Commission issued a joint report summarizing its work, discussing Port conditions and setting forth a proposed compact and com-

Excerpts From Stipulation Among Counsel
Dated December 20, 1974

prehensive plan and maps and drawings depicting its findings and proposals. (Stip. 1) • • •

3. The 1920 Report outlined the chaotic, diverse, inadequate and congested Port facilities existing in 1920 restricting the flow of goods by railroad, steamship and motor truck in the Port area. Extensive discussions of the freight handling problems of carriers are contained in the 1920 Report. Except in passing, the 1920 Report did not deal with passenger transportation plans or facilities but rather the Report recommended proposed solutions to the problems involved in the movement of freight and commodities brought into, out of, and through the Port District. (Stip. 2) • • •

4. The 1920 Report recommended the adoption of a Compact between the two States, establishing a Port District and creating a Port Authority. It included an extensive discussion of the legal precedents concerning Congressional and State powers over interstate commerce. The Report stated:

> "Permissive or restrictive, as the case may be, the power of Congress over the instrumentalities of interstate traffic is exclusive, when in a specific case it has been exercised. But this latter limitation, coupled with the broad police power of the State and its control of intrastate commerce, has left to New York and New Jersey a broad field within which they may act without express Federal consent. It is hoped, of course, by securing congressional approval of any plan which may be adopted, to avoid future conflict with the Federal authority over interstate unification and control of the Port. But for the present the States may act alone." At p. 446.

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Dated December 20, 1974

5. In response to the recommendations of the 1920 Commission and pursuant to the Laws of New Jersey of 1921, Chapter 151 and the Laws of New York of 1921, Chapter 154, commissioners of both States were appointed with authorization to enter into an agreement or compact in the form specified in the statute and to seek the consent of Congress in respect of the agreement. On April 30, 1921 the Compact between the two States (N.J.S.A. §§32:1-1 to 24; N.Y. Unconsol. Laws §§6401-6423) relating to the Port Authority of New York and New Jersey (the "Port Authority") was actually signed. Congressional consent to "each and every part and Article" of the Compact was obtained effective August 23, 1921. (Public Resolution No. 17. 67th Congress, First Session (42 Stat. 174)).

6. The Compact provided in part as follows:

The Preamble of the Compact states that "a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey" and that "the future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money, and the cordial cooperation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans." Article II of the Compact creates the Port of New York District comprising an area of about 1500 square miles in both states centering about New York harbor. Article III establishes the Port Authority as "a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon

it by the legislature of either state concurred in by the legislature of the other, or by act or acts of congress." Article IV states that the Port Authority shall consist of six Commissioners, three from each State.* The Commissioners were to be chosen "in the manner and for the terms fixed and determined from time to time by the legislature of each state respectively." Article VI of the Compact vests in the Port Authority "full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within" the Port District and authorizes the Port Authority "to borrow money and secure the same by bonds or by mortgages." Article VII provides that the Port Authority "shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other" and further provides "the Port Authority shall not pledge the credit of either state except by and with the authority of the legislature thereof." Article XI requires the Port Authority to make plans for the development of the Port District supplementary to or amendatory of any plan theretofore adopted. Article XII authorizes the Port Authority to "make recommendations to the legislatures of the two states or to the congress of the United States, based upon study and analysis, for the better conduct of the commerce passing in and through the Port of New York." Article XV of the Compact provides that "Unless and until the revenues from operations conducted by the Port Authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually for the salaries,

* By Chapter 244, Laws of New Jersey of 1930 and Chapter 419, Laws of New York of 1930 the number of Port Authority Commissioners was increased from six to twelve.

office and other administrative expenses, such sum or sums as shall be recommended by the Port Authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year."* Article XXII defines "transportation facility" to include "railroads, steam or electric, motor truck or other street or highway vehicles, tunnels, bridges, boats, ferries, carfloats, lighters, tugs, floating elevators, barges, scows or harbor craft of any kind, aircraft suitable for harbor service, and every kind of transportation facility now in use or hereafter designed for use for the transportation or carriage of persons or property" and defines "railroad" as "including railways, extensions thereof, tunnels, subways, bridges, elevated structures, tracks, poles, wires, conduits, power houses, substations, lines for the transmission of power, car barns, shop yards, siding, turnouts, switches, stations and approaches thereto, cars and motive equipment."

7. By Laws of New Jersey of 19??, Chapter 9 and Laws of New York of 1922, Chapter 23, a Comprehensive Plan for the development of the Port of New York was adopted by the New Jersey and New York Legislatures. The Comprehensive Plan received the consent of Congress. Ch. 277, Public Res. No. 66, July 1, 1922, 42 Stat. 822. The Comprehensive Plan sets forth the development program initially envisioned for implementation by the Port Authority.

8. In the Comprehensive Plan of 1922, unification of terminal operations and facilities, consolidation of shipments, adaptation and coordination of existing facilities, im-

* The States paid the administrative expenses of the Port Authority through the year 1934. 1935 was the first year in which the Port Authority became self-supporting.

provement of commercial rail, truck and water facilities and other freight handling improvements are set forth as principles to govern the development of the Port Authority. The Comprehensive Plan proposed to establish direct freight connections between New Jersey and Manhattan to furnish "the most expeditious, economical and practical transportation of freight especially meat, produce, milk and other commodities comprising the daily needs of the people." (N.J.S.A. 32:1-29). Section 8 of the 1922 Comprehensive Plan statutes denies the Authority the power to levy taxes or assessments, and provides that the bonds or other securities issued by the Port Authority shall at all times be free from taxation by either State. (Stip. 4-9) • • •

11. The Progress Report of the Port Authority, 1923, made the following statements concerning congressional consent to the Compact and Comprehensive Plan:

> "Some of these powers were such as the States could grant without further action by Congress, but as carrying out many of the steps involved in the Comprehensive Plan by the Port Authority would necessarily involve matters of interstate commerce and the interstate carriers engaged therein, it was deemed of importance by the Commissioners that Congress—which has paramount power over interstate commerce—should give the sanction of Federal authority to the plan, and the Legislatures of both States, therefore, directed the Port Authority to apply to Congress for such power. . . .
>
> "It was only upon the consummation of this step [congressional consent] that the Port Authority became fully equipped to exercise the powers outlined in the compact and intended to be conferred by the two States.
>
> "The Comprehensive Plan is now legally authorized by the two States and the Congress of the United States and the police powers of the States and the interstate commerce power of the Congress are joined in effectuating the definite plan, with one coordinating body as the State and Federal instrumentality."

12. Pursuant to the Compact, Comprehensive Plan and subsequent amendments and supplements thereto, the Port Authority operates all of the interstate vehicular tunnels and bridges in the Port District (which include the Holland Tunnel, the Lincoln Tunnel, the George Washington Bridge, the Bayonne Bridge, the Goethals Bridge and the Outerbridge Crossing).

The Holland Tunnel had been constructed by separate State commissions pursuant to a compact between the States which received the consent of Congress. Chapters 49 and 50, Laws of New Jersey of 1918 and Chapters 70 and 178, Laws of New York of 1919, consented to by Congress, Chapter 11, Public Resolution No. 10, 66th Congress (S.409) (1919). In 1930 the Holland Tunnel was transferred to the Port Authority in order to enable it to honor its obligations to bondholders in the face of deficits incurred in connection with the Arthur Kill, George Washington and Bayonne Bridges and Inland Terminal No. 1. Chapter 247, Laws of New Jersey of 1930 and Chapter 421, Laws of New York of 1930.

Also pursuant to the 1921 Compact, the 1922 Comprehensive Plan and subsequent amendments and supplements thereto, the Port Authority owns and/or operates the fol-

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lowing facilities: Newark International Airport, Teterboro Airport, La Guardia Airport, John F. Kennedy International Airport, two heliports; Port Newark, the Hoboken Port Authority Marine Terminal, the Elizabeth Port Authority Marine Terminal, the Columbia Street Marine Terminal, the Erie Basin Port Authority Marine Terminal and a Mid-Manhattan Consolidated Passenger Ship Terminal; the Port Authority Bus Terminal, the George Washington Bridge Bus Station, the Newark and New York Union Motor Truck Terminals; the Port Authority Trans-Hudson System (operated for the Port Authority through its wholly owned subsidiary, the Port Authority Trans-Hudson Corporation) and the World Trade Center. (Stip. 10-12)

• • •

II. NEW JERSEY'S PUBLIC TRANSPORTATION REQUIREMENTS.

A. Demographic and Transportation Factors.

• • •

3. The following is an excerpt from the 1972 Master Plan of the New Jersey Department of Transportation:

"New Jersey is now the most densely populated State in the Nation. Its problems of urbanization will continue to mount along with its growth in population, industry, commerce and recreational facilities and with the State's increasing importance as the geographic center of the Northeast 'megalopolis.'

"In the past, this growth has meant:

"The highway system has been unable to keep pace with travel demand. The density per lane-mile of daily travel has increased by 56.7 percent over the past 20 years.

"Paradoxically, coincident with a signficant decline in suburban passenger rail service, there

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has been, in recent years, an increased public demand for improved commuter rail service. At present, during the morning peak hour over 54,000 people make the trip between New Jersey and Manhattan by rail.

"Bus service has shown a continual decline in the last decade, yet in the morning peak hour more than 55,000 persons travel by bus from New Jersey to Manhattan.

"A 32 percent increase* in population through 1990 will result in the changing of more than 1,300 square miles of land from rural use to urban use.

"By 1990, motor vehicle registrations in the State will rise to 5,384,000—up 42 percent.

"Annual vehicle miles of travel on the State Highway System will increase 109 percent through 1990, registering a total of 28.1 billion vehicle miles.

"As a result of increased personal income and leisure time there will be a significant increase in recreation-oriented travel on the State's highways.

"Passenger rail patronage will experience a 75 percent increase to total 626 thousand daily riders in 1990.

"Bus ridership will increase to 1.6 million daily riders by 1990, an increase of 24 percent.

"A comprehensive plan to meet the 20-year needs resulting from this growth in the future is estimated to cost almost $7.0 billion. It includes:

*The latest official projection of the State of New Jersey is for a 27 percent increase during the same period (Population Estimates for New Jersey, July 1, 1973, p. 16) [footnote added by stipulation].

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"The highway plan will total $4.276 billion including $900.0 million for completion of the Interstate System, $1.866 billion for the construction of other freeways, $734 million to dualize presently undivided facilities, $588.0 million for widenings and $188 million to correct troublesome spot locations.

"On the State's passenger rail system, including commuter rail and rapid transit, the costs will amount to $1.897 billion.

"An additional $278 million is the estimated cost to provide bus riders of the State with adequate, modern service.

"The above breakdown of estimated costs does not include the anticipated escalation in costs over the 20-year time frame of the plan.

"PASSENGER RAIL SERVICES

"The commuter railroad system is operated by five companies which provide service to an average of 166,130 weekday passengers on a total of 467 route miles.

"Rapid transit services are provided by two public agencies* and one public company** on a total of 26 route miles providing service to an average of 192,400 weekday passengers.

"The total network of passenger rail systems provide service to 15 of the State's 21 counties, the ex-

*Port Authority operates PATH and the Delaware River Port Authority operates PATCO. [footnote added by stipulation]

**Transport of New Jersey operates the Newark subway. [footnote added by stipulation]

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ceptions being Burlington, Cumberland, Gloucester, Salem, Sussex and Warren Counties.*

"In 1950, there were approximately 1,100 route-miles of track in existence in the State providing commuter service to 20 counties, and there were more than 349,000 passenger trips a day. The decline in service over the past 20 years has resulted in only 467 route-miles of track remaining in use today, providing service to 15 counties with only 166,000 passenger trips daily.

"However, existing rapid transit facilities provide service for an additional 192,000 passengers per day. Total rail utilization now averages 358,000 passenger trips per day.

"Although there has been a significant decline in annual rail trips between New Jersey and New York, rail patronage during the commuter peak periods has remained constant.

"While still providing service, the Penn Central, Reading and Lehigh Valley Railroads have gone into bankruptcy in recent months. The Central Railroad of New Jersey has been in bankruptcy since 1967. (Stip. 17-20)

• • •

"THE CORRIDOR STATE

"While the above indicators can be related to growth within the State's boundaries, New Jersey also is in the unusual position of experiencing considerable travel across her boundaries. Because of this, New Jersey has been aptly termed the 'Corridor State.'

*Subsequent to the 1972 Report rail passenger service has been renewed to Warren County. [footnote added by stipulation]

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"This considerable interstate movement is attributable in part to New Jersey's location in the geographic center of megalopolis. The influence of the great urban centers of New York City and Philadelphia has caused the number of people crossing between New Jersey and Pennsylvania to be ranked highest in the Nation while the movements between New Jersey and New York is second highest.

"The largest single movement—commuter travel between New Jersey and Manhattan—amounts to 480,000 person-trips daily. Of this number, slightly less than 50 percent use some form of public transit —rail or bus. The morning and evening peak-hour movements are especially significant. During one peak hour in the morning more than 123,000 commuters cross the Hudson River into Manhattan. Of this total, 87 percent use some form of public transit.

"While the commuter problem is not as severe between the Camden area and Philadelphia, the same trend has emerged. One result has been the construction of the Lindenwold High Speed Line aimed principally at meeting the demand for interstate commuter travel.

"With the expectation that many of New Jersey's rural areas will become suburban 'bedroom communities' for highly concentrated urbanized areas, it is expected that the density of travel across the State's borders will become even more significant in the future. (Stip. 20-21)

• • •

"Before a plan can be developed outlining a solution to serve the transportation needs of the State, a set of objectives—specific goals toward which effort is directed—must be derived. Such a listing of

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Dated December 20, 1974

objectives can lead to policy guidelines defining the atmosphere in which transportation needs can be met.

"TRANSPORTATION OBJECTIVES

"Provide a transportation network equitable to all segments of the State populace

"Increase comfort and convenience of travel

"Reduce adverse impacts on the natural environment

"Promote desired pattern of land development

"Increase safety

"Reduce travel time and cost per trip

"Provide a choice of travel modes

"Be realistic in terms of physical, social, financial and environmental restraints

"POLICY GUIDELINES

• • •

"COMMON CARRIER

"Maintain and strengthen the existing rail and bus system by replacing obsolete equipment.

"Improve the efficiency and quality of rail and bus operations.

"Extend service to areas deficient in service.

"Improve coordination within the total transportation system. (Stip. 22)

• • •

"CORE SECTOR

"The core sector includes all of Hudson County, Newark, and the adjacent portions of the municipalities surrounding Newark. Travel in this sector has several distinct patterns. The Newark portion is

heavily oriented to the Newark Central Business District, with a relatively low level of travel to Manhattan. The Hudson County portion of the sector has a large amount of local, relatively short distance, travel. Trips to Manhattan are most prevalent from the area north of the Lincoln Tunnel. Most travel in the core sector is by bus. The only major rail movements are on PATH, between southern Hudson County and Manhattan, and on the Newark subway. Rail improvements in this sector will be designed to improve travel to and within the Newark CBD and to solve the specialized problem of access to Newark Airport.

"NEWARK AIRPORT ACCESS—Rail access to Newark Airport will be designed to provide service to a variety of points including Manhattan and the Newark central business district.

"This access would be provided by an extension of the tracks of the Port Authority Trans-Hudson Corporation—(PATH) from the present terminus in Penn Station—Newark. A transfer station will be located on airport property west of the Newark Airport terminal complex. This station will permit passengers to transfer to and from the proposed Inter-Terminal Transportation System (ITTS) which will inter-connect the three terminal buildings of the new complex.

"The rail access proposal will connect with and use tracks on the Central Railroad of New Jersey right-of-way near Elizabethport Yard and will continue westward to a terminus that must be determined. A park-ride facility near the crossing of the CNJ main line and the Garden State Parkway is one possible

terminus. Extension of the service to either Plainfield or to the Raritan area is also being considered.

"CENTRAL SECTOR

"The Central Sector includes the area of the State extending from New Jersey Route 3 and U.S. Route 46 on the north to and including the New Jersey Turnpike between Perth Amboy and Bordentown on the South. Suburban rail service is provided in three major corridors by the Morris and Essex Line of the Erie Lackawanna, including the Gladstone Branch; the Main Line of the Jersey Central and the Main Line of the Penn Central. Additional suburban service is provided on the Greenwood Lake and Montclair Branches of the Erie Lackawanna and the New York Branch of the Reading. Travel in this area is largely oriented to Manhattan with a secondary focus at Newark. The majority of commuter travel to Manhattan is by rail, with some bus travel to midtown Manhattan. Most travel to Newark is by bus, with rail travel important only for the longer distances.

"Rail service in the central sector is oriented to three Manhattan entry points. These points of entry are the Penn Central tunnel and the Midtown and Downtown PATH tunnels serving the 33rd Street and World Trade Center areas respectively. Access to Newark is at two points; the Erie Lackawanna and Penn Stations. With the exception of the Morris and Essex, all lines have access to all Manhattan entries. The only direct service provided to Penn Station, Manhattan, is from the Penn Central Main Line. Access from other lines to Penn Station, New York, as well as all access to Manhattan via

Excerpts From Stipulation Among Counsel
Dated December 20, 1974

PATH, requires a transfer. One of the principal goals of planning for this sector is to improve Manhattan access, including access to Penn Station, New York, for all lines and direct service to some point on Manhattan for all lines. (Stip. 24-25)

• • •

"Financial Considerations

"The ability of the Department to successfully implement this Master Plan over the next 20 years is tied inextricably to the annual funding of its construction programs.

"The financing of highways, under existing federal programs, is fundamentally different from the programs for the other modes in that it is based on annual apportionments to the various states based on a pre-set formula—whereas UMTA [Federal Urban Mass Transportation Administration] and FAA furnish federal capital funds on a grant basis for each proposed project for which an acceptable application has been filed.

"Fiscal projections based on historic data assure that normal transportation funding will have to be augmented by substantial amounts of additional monies annually.

"As stated earlier in the report all indicated costs are based on present day estimates and have not been escalated to reflect inflationary costs. No attempt has been made to establish priorities during the development of the Master Plan. Consequently, the individual projects have not been scheduled or programmed. It would therefore, not be realistic to attempt to expand the cost of the individual components without precise knowledge as to the year of contract award.

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"On the other hand, it would be fair to assume that the economic history of this country proves there will be an increase in these costs over the next 20 years.

"Funding Gap to Implement 20 Year Plan

Highway Construction	$4276.0	
Federal and State Matching Programs	2332.0	
Deficiency		–$1944.0
Railroad Passenger Service	$1897.0	
Federal UMTA Grants	1264.7	
Local Matched Share (State)		–$ 632.3
Bus Service	$ 278.0	
Federal UMTA Grants	185.3	
Local Matched Share (State)		–$ 92.7
Airport Development Program	$ 49.0	
Federal Aviation Administration Grants	24.5	
Local Matched Share (State)		–$ 24.5
Total Funding Gap		$2693.5

(All Amounts in Millions)". (Stip. 27-28)

• • •

6. The four private companies which operate commuter railroad services in New Jersey are all being reorganized under federal bankruptcy laws. Three of these four companies reported operating at a deficit in 1960; they attributed their deficits to losses incurred on passenger rail mass transit operations even though one had lower passenger losses than when it operated at a profit and another's deficit was twice as large as its passenger loss. (Farley Committee Hearings, January 26, 1961, pp. 17-22). The four railroads reported to Highway Commissioner Palmer the following results for 1959 and 1960:

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	1959 passenger deficit	1959 corporate profit or deficit	First 11 months of 1960 corporate profit or deficit	Estimated 1960 passenger deficit
Pennsylvania	($37,000,000)	$ 7,200,000	($ 5,000,000)	($32,000,000)
Erie Lackawanna	($ 8,000,000)	($10,000,000)	($16,000,000)	($ 8,100,000)
Reading	($ 7,000,000)	$ 1,800,000	$ 1,100,000	($ 7,000,000)
Central	($ 6,300,000)	($ 2,800,000)	($ 3,400,000)	($ 6,000,000)

7. Reorganization proceedings for the Central Railroad Company of New Jersey were instituted in 1967, for the Penn Central Transportation Company and for the Reading Company in 1970 and for the Erie Lackawanna Railway in 1972. (1973 Program, page 17). The 1973 [New Jersey Department of Transportation Transit Development] Program (Exhibit I) published on September 1, 1973, said of these proceedings:

> "In several cases, the Federal District Courts have instructed the railroad companies to prepare plans for the cessation of passenger and freight service, and in these cases, it is the policy of the State of New Jersey to impress upon the federal courts the necessity of continuing most of these rail services." (1973 Program, page 17).
>
> "Cessation of mass transportation services in these urban areas [refers to the Philadelphia as well as the New York City area] would produce intolerable conditions on the personal lives of the residents of the areas. The State is now directed by the federal government to reduce the levels of air pollution in these areas to a significant degree within the next five years. It has been determined that the existing basic rail and bus systems will fail within the next few years unless a major investment in capital facilities, equipment, and operating subsidies is provided by the public." (1973 Program, page 19).

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8. On January 2, 1974, Congress enacted the regional Rail Reorganization Act of 1973 (45 U.S.C. §701 *et seq.*). Congress found and declared in this statute that: "Essential rail service" in the midwest and northeast region is provided by railroads that are insolvent and attempting to undergo reorganization under the Bankruptcy Act; "this essential rail service is threatened with cessation or significant curtailment because of the inability of the trustees of such railroads to formulate acceptable plans of reorganization"; the public convenience and necessity require adequate and efficient rail service in this region "to meet the needs of commerce, the national defense, the environment and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers"; "continuation and improvement of essential rail service in this region is also necessary to preserve and maintain adequate national rail services and an efficient national rail transportaion system"; "rail service and rail transportation offer economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conservation, resource allocation, safety, and cost per ton-mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest"; and that these needs could not be met without substantial federal participation. Among the goals of the federal plan for reorganization and modernization of the railroads in the northeast corridor are: the establishment of improved high-speed rail passenger service; the utilization of those modes of

transportation in the region which require the smallest amount of scarce energy resources and which can most efficiently transport energy resources; the attainment and maintenance of any environmental standards, particularly the applicable national ambient air quality standards and plans established under the Clean Air Act Amendments of 1970; and the movement of passengers and freight in rail transportation in the most efficient manner consistent with safe operation, including the requirements of commuter and intercity rail passenger service.

The Act established the United States Railway Association, which was authorized to carry out the purposes of the Act and in furtherance thereof to issue bonds, debentures, securities or other obligations guaranteed by the Secretary of Transportation, with the maximum aggregate amount of obligations outstanding at any one time not to exceed $1.5 billion. Pending implementation of the final system plan, the Secretary of Transportation was authorized to expend up to $85 million to be paid to the trustees of railroads in reorganization for the continued provision of essential transportation services by such railroads.

With respect to local rail service, Congress found and declared (45 U.S.C. § 762) that: "The Nation is facing an energy shortage of acute proportions in the next decade"; "railroads are one of the most energy-efficient modes of transportation for the movement of passengers and freight and cause the least amount of pollution"; "abandonment, termination, or substantial reduction of rail service in any locality will adversely affect the Nation's long-term and immediate goals with respect to energy conservation and environmental protection." Accordingly, the Secretary was directed to provide financial assistance to States or local or

regional transportation authorities for the purpose of rail service continuation subsidies, 70% of which is to be paid by the federal government and 30% of which is to be paid by the affected State. Federal funding up to $90 million total per year for 2 years is authorized. The Secretary was authorized to issue regulations within 90 days to put this program into effect. Such regulations have not yet been promulgated. On December 16, 1974 the Supreme Court of the United States upheld the constitutionality of the Act.

9. Pursuant to the Regional Rail Reorganization Act of 1973 the United States Railway Association has submitted a plan recommending that approximately 300 miles of trackage owned by bankrupt railroads in New Jersey be abandoned. (Stip. 30-35) • • •

In October 1974, Alan Sagner, the New Jersey Commissioner of Transportation publicly stated that even if the final federal plan called for a reduction of 150 miles of rail lines in New Jersey, "that could have a disastrous impact on our economy and environment." At the request of Governor Byrne, the New Jersey Legislature approved for submission to the voters of New Jersey in the November, 1974 elections a proposed $100 million rail preservation bond issue that would allow the State to purchase railroad rights-of-way that would be abandoned under the federal plan. This bond issue was defeated in the November, 1974 election by a vote of 893,622 to 854,083.

10. In September, 1974 Commissioner Sagner stated publicly:

(1) The State of New Jersey has not yet spent $106 million of the mass transportation bond issue of $200 million authorized in 1968. The bulk of this money is expected to be obligated within the next year on the reelectrification of

and the purchase of 200 new commuter cars for the Morris & Essex Division of the Erie-Lackawanna Railroad, electrification of the New York and Long Branch Railroad from South Amboy to Red Bank and the purchase of 1,500 new buses and 300 used buses, but $68 million of the total funds is expected to remain contractually uncommitted as of July 1, 1975.

(2) According to 1970 census figures 3.6% of the 2,839,545 people in New Jersey who work commute by railroad.

11. In support of a $200 million proposed bond issue for highways, Commissioner Sagner said in his question and answer release of September, 1974:

> "1. We should not ask for new money for public transporation projects until we have met the following criteria:
>
> "We have obligated the money the voters authorized in 1968; we hope to do this within a year. We developed a *comprehensive* public transportation plan that will show the voters what type of public transportation service will be available after the expenditure of necessarily large sums of capital. This study is underway, but will take at least a year to complete. We should also, at that time, be able to predict the annual operating subsidy needed to maintain the public transportation system. The voters should be prepared to undertake this obligation when they approve a project."

"2. Improving the roads without providing a mass transit alternative will encourage a greater use of cars and will add to the problem of air pollution when we are trying to reduce it. Isn't that correct?

"The Department is developing public transportation programs, but no matter what is done, individual cars will be used for the foreseeable future. The New Jersey Energy Office and the Tri-State Regional Planning Commission have publicized statements indicating that congestion, as opposed to free-moving traffic, increases pollution.

"3. Some groups say the highway safety and improvement bond issue would do nothing for mass transit. Is that true?

"The most vital and widespread form of mass transit now and in the foreseeable future is the bus. The bus travels on highways.

"4. If the highway projects are so important, why aren't you willing to make this a combined highway-public transit bond issue, if only to get the support of the public transit advocates, and thereby give the highway portion a better chance of approval?

"As explained, it would be irresponsible to request funds *now*, for a public transportation bond issue as the public transportation money is not needed *now*. Proposing a combined highway safety and improvement public transit bond issue to win support of the public transit advocates and environmentalists would not be honest. A serious problem in government today is the inability of the citizens to trust public officials. In the long run such tactics would result in the Department losing credibility and support for all future efforts." (Stip. 36-39) • • •

B. The Energy Crisis

1. On February 4, 1974, the New Jersey Legislature enacted the Emergency Energy Fair Practices Act of

1974 (L. 1974, c. 2, amended and supplemented by L. 1974, c. 6). Section 2 of this Act stated: "The Legislature finds and determines that because of world conditions and the manner in which energy sources and fuels are allocated and distributed that an energy shortage now exists and may continue for the foreseeable future." Section 3 of the Act authorized the Governor "to proclaim by Executive Order the existence of an energy emergency" and to establish a State Energy Office and appoint an Administrator with broad powers to control the use and distribution of all fuels.

2. On February 5, 1974, Governor Byrne issued Executive Order No. 1 in which he proclaimed the existence of an energy emergency, created the State Energy Office and established the position of Administrator of that Office.

3. On or about March 14, 1974, a civil action entitled *Byrne, et al.* v. *Simon, et al.,* Civ. No. 74-372, was instituted in the United States District Court for the District of New Jersey in which the complaint alleged that the State of New Jersey had not received from the Federal Energy Office an equitable allocation of gasoline for the month of March 1974.

4. In support of an application for an Order to Show Cause, plaintiffs in *Byrne* v. *Simon* submitted an affidavit dated March 13, 1974 by Richard W. DeKorte, who had been appointed Administrator of the New Jersey Energy Office. Paragraph 4 of that affidavit stated:

> "In many communities there were wholesale closings of service stations. As a result, large numbers of people were totally unable to obtain gasoline and therefore were prevented from either engaging in

> their respective employments or from obtaining necessary food supplies, medical services, and other necessities of life. An already high unemployment rate was threatened with further increases. This was due to the fact that many employers were not able to obtain deliveries of necessary products and were faced with situations where many employees were either tardy or not coming in at all. Obviously, there were severe economic dislocations in the business community.
>
> "In those areas where a few retail gasoline stations were in fact open, it was commonplace to observe long lines of cars extending on to the public roads of New Jersey that were waiting for gasoline. Ingress and egress to homes and commercial establishments on many occasions were blocked. Traffic on said roads were severely disrupted. The threat of serious accidents not only to property but more importantly to life was constantly present. And tensions and emotions were rising to dangerously high levels. State and local law enforcement personnel were on alert in order to be prepared for public safety problems of the worst magnitude.
>
> "Emergency services were severely cut back. It was not uncommon to learn of local law enforcement personnel, first aid personnel, and fire fighting personnel that were not able to obtain sufficient quantities of motor gasoline that allowed them to be anywhere near the minimum state of readiness that is necessary for them to carry out their responsibilities."

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There is no shortage of gasoline in the State of New Jersey as of December, 1974.

5. In a news release issued on December 3, 1973 the Regional Plan Association commented on the relationship of the energy crisis to transportation [in the tri-state New York urban region]: (Stip. 43-45) • • •

"ENERGY FOR TRANSPORTATION

"Fuel for transportation has shown the second largest absolute growth, following that for electricity generation.

Passenger

"Passenger transportation consumption rose from 367 trillion Btu of gross input in 1950 to 904 trillion Btu in 1970. This increase is attributable to five factors:

"1. *Population growth* accounts for 32 percent of the increased consumption.

"2. *More autos per capita and longer trips* (mostly by air) resulted in more miles of travel per person, which explains 26 percent of the increase in fuel use. The frequency with which people make trips increased somewhat, mostly due to wider automobile ownership. The length of the average trip increased considerably mostly due to more trips to and from points outside the Region.

"3. *The shift away from buses and rail* vehicles toward more energy intensive modes, such as autos, and airplanes, accounts for 20 percent of the increase.

"4. *Declining vehicle occupancy*—fewer persons per car, per bus or rail car, accounts for 12 percent.

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"5. *The increasing energy-intensity of each mode of travel*—more gasoline needed per mile—because of higher performance, more air conditioning, etc. explains 10 percent.

Energy Use of Modes of Travel

"*Bus* is the least energy-intensive mode, requiring about 2,300 Btu per passenger mile of travel.

"*Rail,* combining both electric and diesel-electric traction, uses 2,600 Btu of Gross input per passenger mile but carries passengers more than three times faster than a bus in return for the 15 percent higher use of energy per passenger.

"*Subways,* with 3,100 Btu per passenger mile, are more energy-intensive because of the stop-and-go operation, which wastes much energy in braking. New devices to eliminate some of this waste are being tested by the Metropolitan Transportation Authority.

"*Auto,* using 6,500 Btu per passenger mile in 1970, was twice as intensive as the subway.

"*Air,* using 11,600 Btu per passenger mile, uses twice as much energy as the auto.

"*Taxi-cabs and private airplanes* (general aviation) are most energy-intensive." (Stip. 48-49) • • •

6. The United States consumes 18 million barrels of petroleum a day, but produces only 11 million of those barrels from domestic sources. The difference is made up by imports. Presidental Message to Congress on the En-

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ergy Crisis, U.S. Code. Cong. and Admin. News, 93rd Cong., 2d Sess. at 31, 32 (Feb. 21, 1974, monthly ed.)

7. President Nixon went on to say:

> "We must also face the fact that when and if the oil embargo ends, the United States will be faced with a different but no less difficult problem. Foreign oil prices have risen dramatically in recent months. If we were to increase our purchase of foreign oil, there would be a chronic balance of payments outflow which, over time, would create a severe problem in international monetary relations." *ibid* at 36.

8. President Nixon also noted that the United States would "continue to be vulnerable to interruptions of foreign imports." *ibid.*

9. President Nixon further noted that Project Independence had been put forward to phase out dependence upon high priced foreign oil, with its attendant risk of economic breakdown at the will of oil producers. Project Independence entails three concurrent tasks: expansion of domestic energy supplies; conservation; and new energy research. On conservation, the President wrote, "We must reduce demand by eliminating non essential energy use and improving the efficiency of energy utilization." *ibid.* President Nixon stated: "It is now widely recognized that the development of better mass transit systems may be one of the key solutions to both our energy and environmental problems." *ibid* at 42. (Stip. 50-51) • • •

12. According to figures compiled from Survey of Current Business, and BP Statistical Review, automotive gasoline comprises roughly 40% of the total demand for oil.

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C. Health and Environmental Factors

1. In 1950, pursuant to a resolution of the Senate and General Assembly, a legislative commission was created to study air pollution in New Jersey and to recommend legislation. (House Concurrent Resolution No. 16; Senate Concurrent Resolution No. 9, 1951)

2. The commission referred to in the immediately preceding paragraph issued a report to the New Jersey State Legislature in March, 1952 which included a review of air pollution conditions and legislation in other states and recommendations for air pollution abatement legislation in New Jersey. The 1952 report pointed out that air pollution was caused by a variety of activities and that industry alone was not responsible for it (Report, p. 28). The 1952 report specifically noted that emissions from automobiles contributed to air pollution. (See, for example, Report pp. 38, 67)

3. New Jersey enacted in 1953 The Smoke Control Code of New Jersey, N.J. Rev. Stat. 26:3-69.6, which prohibits emission of smoke of a certain density. The Smoke Control Code of New Jersey was subject to adoption by reference by local Boards of Health and was not enforceable until adopted.

4. The New Jersey Bureau of Adult and Occupational Health instituted in 1953 a comprehensive air sanitation program. The three objectives of that program were to assist in the establishment of local control of air pollution, to conduct air sanitation research, and to provide technical and scientific assistance in solving the problem of excessive air pollution.

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5. In 1954, the New Jersey Air Pollution Control Act was enacted into law (Chapter 212, Laws of New Jersey of 1954). Under its provisions, an Air Pollution Control Commission was appointed by the Governor as an agency of the State Department of Health. The Commission was empowered to promulgate and amend codes to control and prohibit air pollution in the State . The State Department of Health had the responsibility of controlling air pollution in accordance with any code, rule or regulation promulgated by the Commission.

6. President Dwight Eisenhower in 1955 noted in his special health message:

> "As a result of industrial growth and industrial development, the atmosphere over some population centers may be approaching the limit of its ability to absorb air pollutants with safety to health."

Congress enacted in the same year the Air Pollution Control—Research and Technical Assistance Act which authorized the Department of Health, Education and Welfare, through the United States Public Health Service, to utilize the resources of the Federal Government and to cooperate with State and local governments and educational institutions in the preparation and execution of programs of research into the problem of air pollution. Senate Report No. 389, May 27, 1955 stated that one of the reasons for the legislation was the serious nature of the air pollution problem. (Senate Report pp. 2457, 2559)

7. A study was conducted in the summer and fall of 1957 by the Interstate Sanitation Commission of smoke and air pollution in certain areas of New York and New Jersey.

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The study found, among other things, that, although there were many sources of air pollution in Newark, the primary source at the point sampled was traffic gases. The primary source of air pollution in Manhattan was also found to be motor vehicle traffic.

> "A study of air pollution by the Interstate Sanitation Commission in 1957 confirmed that there is considerable transport of air contaminants across the New York and New Jersey state boundaries in both directions, depending on wind and weather conditions.
>
> "The prevailing wind direction is north-westerly. This means that even if the New York City Department of Air Pollution Control were to attain 100 per cent effectiveness in its work against local sources of air pollution, New York City would still have an air pollution problem of substantial magnitude, and one which will continue to grow." (Stip. 52-56) • • •

8. In the 1950's New York State conducted several statewide surveys to assess New York's air pollution problem. One of these studies begun in 1952 by the Joint Legislative Committee on Pollution Control culminated in the passage of the Air Pollution Control Act in 1957 (Article 12-A, Chapter 931, Laws of New York). This Act amended the Public Health Law and was designed to safeguard the State's air resources by (a) detecting, controlling or abating existing air pollution and (b) preventing new air pollution. Administration of the act was delegated to the Air Pollution Control Board which was created within the New York State Department of Health. The Board has

the power to adopt and enforce rules and regulations for prevention and control of air pollution. Other important board functions include provision of advisory technical consultation services; development and conduct of demonstration programs in cooperation with communities; training local personnel, and supervision of air pollution control education.

9. In March 1960, the City Administrator of the City of New York issued a report entitled "Air Pollution Control: Organization and Operation." This report stated:

> "We find . . . there is little evidence of any absolute decline in the amount of air pollution as a result of the department's activities. The best that can be said is that the volume of pollutants would probably have been greater if there had been no control program . . ."

* * *

15. The United States Clean Air Act, as amended in 1970, requires the Administrator of the Environmental Protection Agency to establish national primary and secondary air quality standards for air pollutants. 42 U.S.C. §1857C-4. Primary ambient air standards shall be such as "are requisite to protect the public health." 42 U.S.C. §1857C-4(b)(1). Secondary ambient air quality standards "shall specify a level of air quality the attainment and maintenance of which . . . is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. §1857-4(b)(2).

16. Pursuant to Section 107(b) of the Clean Air Act, 42 U.S.C. §§1857-1857(1), the Commissioner of the National Air Pollution Administration has been delegated authority

to issue air quality criteria reports to facilitate formulation of standards on the basis of up-to-date scientific knowledge concerning the full range of effects of pollutants. The National Air Pollution Control Administration issued its reports, Air Quality Criteria For Carbon Monoxide, Publication No. AP-62 (1970) and Air Quality Criteria for Hydrocarbons, Publication No. AP-64 (1970) pursuant to that authority. The current levels of these pollutants in the air of the New Jersey-New York-Connecticut metropolitan region are in excess of federally-mandated standards.

17. Air Quality Criteria for Carbon Monoxide, National Air Pollution Control Administration Pub. No. AP-62 (1970), stated that "the largest single source of CO (carbon monoxide) is the exhaust of motor vehicles, both gasoline and diesel powered." (AP-62 page 4-2). In the New York Metropolitan area, an estimated 95.5% of all CO emissions came from transportation. (*Ibid.* page 4-6). Air Quality Criteria for Hydrocarbons, National Air Pollution Control Administration Publication No. AP-64 (1970), stated that, on average, 70 percent of hydrocarbon emitted into the air came from transportation sources. (AP-64 page 2-14). (Stip. 58-60) * * *

20. The Federal report on carbon monoxide found that low concentrations of COHb [carboxyhemoglobin] in the blood of experimental subjects produced impairment in time-interval discrimination, changes in visual acuity and relative brightness threshold, and an impairment in capacity to perform psychomotor tests. (AP-62 at pages 8-51, 8-52).

21. The Federal report on carbon monoxide found that the following cardiovascular changes have been observed at COHb levels above 5%:

"Increased cardiac output, systemic arterio-venous oxygen-content differences, systemic oxygen extraction ratios, myocardial arterio-venous oxygen-content difference, and coronary blood flow in patients without coronary heart disease." (AP-62 at page 8-52).

22. The Federal report on carbon monoxide noted that

"the population group most susceptible to the adverse effects of atmospheric CO can be predicted on a physiological basis to include those persons most sensitive to a decrease in oxygen supply: (1) people with severe anemia due to the already limited supply of oxygen-carrying hemoglobin; (2) those with cardiovascular disease and the resultant impairment of circulation; (3) those with abnormal metabolic states such as thyrotoxicosis or fever, which result in increased oxygen demands; (4) those with chronic pulmonary disease; and (5) the developing foetus." (AP-62 at page 9-8).

23. The Administrator established national primary and secondary ambient air standards for carbon monoxide which he judged necessary to "protect the public health." 40 CFR § 50.2. The standards call for concentrations no greater than 10 mg. per cubic meter (9 parts per million) at a maximum eight hour concentration not to be exceeded more than once a year, and 40 mg. per cubic meter (35 parts per million) at a maximum one hour concentration not to be exceeded more than once a year. 40 CFR § 50.8.

24. The Federal report on carbon monoxide noted:

"No long-term human studies on experimental CO exposures have been reported, although there are

data on occupational exposures. Brief exposures to high levels of CO have produced effects on the central nervous, vascular, and respiratory systems." (AP-62 at pages 8-46)

"In many of the human studies, the brief exposures to very high levels of CO make it difficult to relate the observed effects to equilibrium COHb levels. For long-term exposure to CO, certain effects such as increased hematocritis, hemoglobin levels, and blood volume may be present, but the available data are inadequate to draw firm conclusions concerning the significance of all of these changes." (AP-62 at pages 8-51)

"Long-term experimental exposure of humans to CO may produce certain adaptive effects such as increased hemoglobin levels and hematocritis, but the available data are inadequate to draw firm conclusions. Such effects have been observed in animals. There is a definite need to further evaluate the effect of cigarette smoking on the central nervous system and cardiovascular system, as well as the possible 'adaption' of the cigarette smoker to CO." (AP-62 at pages 8-52)

"Research on the physiology of CO in the human body has provided considerable information on both endogenous CO production and on the effects of CO at various cellular and microcellular levels. Our knowledge of the effects of CO on enzyme systems and tissue oxygenation, however, is far from complete. In addition, mechanisms of CO catabolism in the body remains undefined. The uptake of CO dur-

ing varying time periods and with changes in activity must be further demonstrated.

"Studies of the effects of CO on human behavior and performance need both clarification and replication. Definition and sophistication of parameters sensitive to changes in blood hemoglobin merit considerable attention as a prerequisite to better defining the influence of CO on human performance." (AP-62 at page 10-5)

25. The federal report on hydrocarbons, National Air Pollution Control Administration Publication No. AP-64, covers "the class of hydrocarbons . . . which exist in the atmosphere in the gas phase." The report notes that "[m]any of these compounds may enter into atmospheric photochemical reaction processes leading to the products and manifestations associated with photochemical air pollution." (AP-64 at page 2-1). Motor vehicles are responsible for 49 percent of hydrocarbon emissions. (AP-64 at page 2-12).

26. The hydrocarbon report notes that "health effects (including eye irritation), vegetation damage, material damage, and visibility reducton have all been associated with the products that result from the interaction of hydrocarbons within the nitrogen dioxide atmospheric photolytic cycle." (AP-64 at page 5-1). (Stip. 61-64) •••

28. The Administrator of the Environmental Protection Agency set national primary and secondary ambient air quality standards for hydrocarbons which he judged necessary to "protect the public health". 40 CFR § 50.2 et seq. These standards call for maximum concentrations of 160 mg. per cubic meter (0.24 ppm) for a three hour concentration (6-9 A.M.) not to be exceeded more than once a year. 40 CFR § 50.10. Implementation of this standard is necessary to achieve the national standards for photochemical oxidants, which are produced by reactions with hydrocarbons. The national primary and secondary air quality standards for photochemical oxidants call for concentrations of 160 mg. per cubic meter (0.08 ppm) maximum one hour concentration, not to be exceeded more than once per year. 40 CFR § 50.9. (Stip. 65)• • •

The [hydrocarbon] report concluded that:

> "Our present state of knowledge does not demonstrate any direct health effects of the gaseous hydrocarbons in the ambient air on populations, although many of the effects attributed to photochemical smog are indirectly related to ambient levels of these hydrocarbons." (AP-64 at page 8-4&5)
>
> ". . . it has been demonstrated that ambient levels of photochemical oxidants which do have adverse effects on health, are a direct function of gaseous hydrocarbon concentrations; and when promulgating air quality standards for hydrocarbons, their contribution to the formation of oxidants should be taken into account." (AP. 64 at page 8-5).

30. Pursuant to section 107(a) of the Clean Air Act, as amended, the Administrator of the Environmental Protection Agency is required to "designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment or maintenance of ambient air quality standards." 42 U.S.C. § 1857C-2(c).

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31. Exercising his administrative authority, the Administrator has designated the New Jersey-New York-Connecticut Interstate Air Quality Control Region. The region comprehends most of the Port District, including Bergen, Essex, Hudson, Middlesex, Monmouth, Morris, Passaic, Somerset and Union Counties as well as extensive sections of Connecticut and New York State. 40 CFR § 81.13.

32. Section 107(a) of the Clean Air Act, as amended, provides that "each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for each State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State." 42 U.S.C. § 1857C-2 (a).

33. Pursuant to Section 107 of the Clean Air Act, as amended, the Administrator shall, if a State does not submit an implementation plan, or submits an inadequate plan, and subject to certain opportunities for extension, formulate his own implementation plan to achieve the national ambient air quality standards in the affected part of the air quality control region. 42 U.S.C. § 1857C-5(c).

34. The State of New Jersey has not formulated a plan, satisfactory to the Administrator, to achieve compliance with the federally mandated national ambient air quality standards for carbon monoxide or photochemical oxidants (hydrocarbons) within its portion of the New Jersey-New York-Connecticut Air Quality Control Region.

35. The Environmental Protection Agency on November 13, 1973 promulgated implementation plans for New Jersey

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dealing with carbon monoxide and hydrocarbons as set forth in 38 Federal Register 31388 to 31400. Since that date many changes have been made, most of them postponing dates of compliance. Negotiation between the Federal Environmental Protection Agency and the Department of Environmental Protection is going on to determine whether other changes are to be made. Judicial notice may be taken of the Plan and related materials in the Code of Federal Regulations and the Federal Register.

The State has openly opposed many of the provisions of the proposed plan. There does not appear to be a present intention on the part of the New Jersey authorities charged with air quality control to submit an alternative plan.

36. Since February 1, 1974, when the New Jersey mandatory auto emission testing program went into effect there has been a 20% reduction in carbon monoxide concentration in New Jersey's air. Reporting on this accomplishment, Russell E. Train, Environmental Protection Agency Administrator, praised New Jersey as a national leader in air pollution control. A spokesman for the State Bureau of Air Pollution Control stated that the 20% reduction in carbon monoxide levels brought the content of the contaminant from four parts per million in the first six months of 1973 down to 3.3 parts per million in the first six months of this year. The spokesman said that the improvement in air quality is bringing the State closer to the standards the federal government has told New Jersey to meet by 1977. However, he noted that the State may have to take further steps to reduce air pollution caused by auto emissions to meet the stringent requirement.

There was a similar decline in carbon monoxide concentration in New York City, which does not have an automo-

tive emission testing program. At the Queensboro Bridge, carbon monoxide concentrations were 20.8 parts per million in June 1973 and 15.5 parts per million in June 1974, a 25 per cent improvement. In February 1973, the figure was 15.9, while in February 1974 it was 13.5. On Canal Street, the carbon monoxide reading in January 1973 was 9.6 and in January 1974 it was 7.1. In June 1973 the concentration was 9.3 and in June 1974 the concentration was 10.1. According to an article appearing in the December 3, 1974 issue of *The Star Ledger*, New York Environmental Protection "officials confirmed that auto pollution was less during the period of the gas shortage." The article also stated:

> "Having only 10 months' experience with mandatory emission control testing, and this coinciding with a period of generally curtailed driving because of an energy crisis, neither federal EPA nor [New Jersey] DEP officials can make a convincing case for the experimental program."

III. History of Rapid Transit in the Port District.

A. Prior to 1962.

1. Chapter 591 of the Laws of New York of 1921 created a commission to prepare "a preliminary plan and report, including estimates, for the combination, improvement and extension of existing rapid transit railroads, street surface railroads, and * * * omnibus lines and any railroad used for local service, operating between a point or points within the city of New York and a point or points within the county of Westchester, * * * and for otherwise improving, by new construction or otherwise, the transportation facilities between the city of New York and the county of Westchester."

2. Chapter 104 of the Laws of New Jersey of 1922 established a commission to study and report upon plans for providing a comprehensive scheme of rapid transit between various communities in northern New Jersey and the City of New York. The preamble to the aforesaid act contained legislative findings as follows:

> "Whereas, By act of the Legislature entitled 'An act to authorize a commission to enter into compact or agreement with the State of New York for the development of the port of New York,' passed April seventh, one thousand nine hundred and twenty-one, a commission now exists for the development of a comprehensive plan for the development of said port; and
>
> "Whereas, Said comprehensive plan in its consideration of transportation problems does not include the problem of passenger traffic in the territory covered by said port development plan; and
>
> "Whereas, Said problem of passenger traffic should be considered in co-operation with the port development commission so as to develop an efficient system of rapid passenger transit between the New Jersey municipalities lying within the territory covered by said port development plan and between said respective municipalities and the city of New York."

3. Pursuant to the aforesaid statute and subsequent joint resolutions passed by the New Jersey Legislature, a North Jersey Transit Commission undertook a comprehensive study of the rapid transit needs of a nine county

area of New Jersey. The 1925 report of the Commission stated:

> "... New Jersey must give immediate and thoughtful consideration to its transit problem in order that its growth and prosperity shall be continued and in order that its natural development may not be retarded.
>
> "Already the nine northern counties of New Jersey are confronted with a serious situation and that situation is growing more serious each year.
>
> "If the solution of the transit problem is delayed longer . . . (t)he result would be disastrous to New Jersey.
>
> "This transit problem is one of great magnitude and many complexities. Its solution lies almost as much on the New York side of the river as in New Jersey.
>
> "The State of New Jersey must change the present inharmonious, inefficient and almost impossible transit chaos to a comprehensive, efficient and workable whole that will adequately serve commuters to New York as well as properly build up this section of the State."

The report favorably considered the establishment of a double loop system connecting all the railroads of North Jersey to a direct New York City system running from lower Manhattan to 59th Street.

4. On January 15, 1926, the North Jersey Transit Commission presented a comprehensive plan to meet the mass

transit crisis of northern New Jersey. The 1926 report stated that:

> "Northern New Jersey has an acute transit problem.
>
> "The need for relief is so urgent that temporary measures must be resorted to at once if permanent and more comprehensive plans cannot be carried out in the very near future."

The 1926 report recommended an Inter-State Loop Line, a Meadows Transfer Station, direct rapid transit access to New York City, Hudson and Manhattan Railroad extensions in New Jersey and the extension of New York rapid transit service to New Jersey. (Stip. 66-73)

• • •

7. In 1927 the New Jersey Legislature, stating that it was acting "under and pursuant to the provisions of the [Port Authority] compact," "authorized and directed" the Port Authority "to make such plans for the development of said district supplementary to or amendatory of the comprehensive plan heretofore adopted by the Legislatures of the two States . . . as will provide adequate interstate and suburban transportation facilities for passengers traveling to and from one State to the other within the said district, and from one part of the said district to another, sometimes referred to as commuter or suburban passenger traffic, to the end that travel between the various parts of the port district may be made more convenient, practicable and economical for those residing in one region in the port district and doing business in another region thereof." The Port Authority was also directed to "submit, as a part

of its report, a legal plan for the financing of the said improvements through the Port of New York Authority as the corporate municipal instrumentality of the two States or otherwise." This legislation, which became Chapter 277 of the Laws of New Jersey 1927, was signed by Governor Moore of Jersey and was approved in 1928 by the New York Legislature but was vetoed by Governor Alfred E. Smith, who issued the following statement in support of his veto:

> "NOT APPROVED.
>
> "This bill aims to authorize and direct the Port of New York Authority to study the interstate suburban passenger problem of the metropolitan district with a view to enlarging the comprehensive port plan so as to comprehend suburban traffic relief.
>
> "There can be no question as to the urgent need of working out a solution of the suburban passenger traffic problem in the metropolitan district. The present railroad stations and traffic facilities in New York City, so far as suburban transportation is concerned are already hopelessy inadequate and no hope for the future lies in the efforts to expand these facilities. On the other hand, I am satisfied that no solution can be found by merely dumping suburban passengers at the out'ying parts of the city and forcing them into the already overcrowded city subway and elevated systems. Some solution must be found along the lines of an entirely new suburban subway system through which suburban trains can be operated connecting New Jersey, Westchester and Long Island with New York City

> and with each other. Various attempts to solve this problem have been made through special legislative commissions and through private agencies and organizations. The solution now proposed is that the Port of New York Authority finance these facilities through the issuance of bonds similar to the bonds issued to finance the various Hudson River and Staten Island bridges.
>
> "No one can question my interest in and support of the Port of New York Authority. I was a member of this authority by appointment of Governor Miller between my first and second terms as Governor and represented the authority at Albany when the comprehensive plan for port development was adopted by our State Legislature. I have been and am vitally interested in carrying out this comprehensive plan. It has been a source of great satisfaction to me to see the soundness of the financial principles back of the Port Authority demonstrated in the building of the great bridges which are now under way. On the other hand, it has been a great disappointment to me to find that the opposition of the railroads has prevented to date the making of real progress in working out the program of freight distribution in the port which always has been the main object and purpose of the Port of New York Authority. I am satisfied that the Port Authority should stick to this program and I am entirely unwilling to give my approval to any measure which at the expense of the solution of the great freight distribution problem will set the Port Authority off

on an entirely new line of problem connected with the solution of the suburban passenger problem.

"For the above reasons, the bill is disapproved.

(Signed) ALFRED E. SMITH"

8. The Port Authority's 1928 Annual Report stated:

"In its last annual report, the Port Authority advised that creation of the Suburban Transit Engineering Board had resulted in wholehearted cooperation between the various public agencies of the Port District and the railroads concerned with the problem, and recommended that the cooperative efforts of these associated interests being devoted to a solution of this difficult problem, be fostered and encouraged, and further suggested as a helpful measure to this end, the passage of legislation by the State of New York concurring with New Jersey in its direction to the Port Authority, as contained in Chapter 277, Laws of 1927.

"An appropriate bill to this end was passed by the New York Legislature at the 1928 session but met with the Governor's veto. This failure of this legislation resulted in no funds being made available to the Port Authority for specific purposes of suburban rapid transit.

"However, upon mature consideration, the Commissioners of the Port Authority resolved to continue the Suburban Transit Engineering Board and its support thereof to the extent funds available might permit. The reasons therefor are contained in the following resolution adopted at a meeting of

the Commissioners, June 11, 1928, which provided in part:

"Since the adoption in 1922 of the statutory Comprehensive Plan by the two states, dealing with the transportation of freight, the States of New York and New Jersey have, by various acts, added to the said Plan the building and operation by the Port Authority of four bridges over which passengers are to be carried by vehicles and/or rail;

. . . . .

"The Commissioners of the Port Authority have found in their studies that no adequate or effective interstate transportation development can take place without taking full account of transportation of passengers as well as of freight throughout the Port District;

. . . . .

"At many points in the statutory Comprehensive Plan, problems arise as to which rail or bridge facilities shall be used primarily for freight or primarily for passenger service, and which for both." (Stip. 75-78) • " •

10. On February 27, 1928, the North Jersey Transit Commission issued its annual report for the year 1927. The report recognized:

". . . the growing impatience of the public with the discomforts, indecencies, delays and money losses caused by present means of travel . . . and is prosecuting its work with due regard to the urgency of the problem.

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> "Better transportation for some 350,000 daily commuters between their homes in this state and their work in New York . . . is an acute present problem, the solution of which is vital to the welfare of an army of our citizens."

The report noted "with keen satisfaction . . . a significant achievement during the past year in respect to the commuter problem"—during a conference between the North Jersey Transit Commission and the Commissioners of the Port Authority, "decision [was] reached that the bi-state character of the Port of New York Authority enabled it to function admirably as a co-ordinating agency between the various official bodies severally engaged in the study of the commuter problem in different parts of the Metropolitan District of New York and New Jersey." The report announced the formation of the Suburban Transit Engineering Board (including the Port Authority) to act as a central agency of transit commissions, railroads, and allied state bodies concerned with the problem of commuter transportation. Negotiation between the North Jersey Transit Commission and the Port Authority brought about a contract between the two agencies under the terms of which financial support was jointly provided for the Suburban Transit Engineering Board. The formation of the latter Board permitted the North Jersey Transit Commission to devote its entire effort toward the development of a New Jersey system leaving the interstate problem to the Suburban Board, which included the Port Authority. (Stip. 79-80) • • •

23. In a 1951 report [submitted to Governor Driscoll, L. Alfred Jenny, consulting engineer] traced the history of previous plans to develop rapid transit facilities commencing in the 1890's. Mr. Jenny listed 16 separate plans, including six of his own between 1921 and 1951. Mr. Jenny noted that the 1920 Plan of the New York-New Jersey Port and Harbor Development Commission (the "Red Book") had stated, "Our Port problem is primarily a railroad problem . . . therefor, the comprehensive plan to evolve which this Commission was created is essentially a railroad plan. . . . A complete reorganization of the railroad terminal system is the most fundamental physical need of the Port of New York. . . . The most pressing element of the entire port problem is that of railroad service to and from Manhattan." Mr. Jenny further noted that "although 30 years have elapsed since, and our problem has grown very much worse, we still have done nothing to solve it." Noting that the Port Authority's March 1, 1937 report had stressed the desirability of the development of rapid transit facilities for northern New Jersey, Mr. Jenny stated: "This sound advice was given a decade and a half ago, yet no one has paid any attention to it, not even the Port Authority itself. On the contrary, it has actually worked for more highway traffic, which it had admitted would never solve our problem, and even today, it is talking of building more vehicular facilities instead of endeavoring to do the railroad job it was created to do over three decades ago." Mr. Jenny also noted that on December 1, 1950, a commuter organization of passengers of the Central Railroad had issued a report, following a conference with Port Authority officials, which stated, "The general aim of the Port Authority seemed to be that of avoiding transit problems." In reference to the existing situation he stated:

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> "For three decades we have been making plans, and spending money in an effort to solve this prob-

lem. All we have to show for this effort is a series of partial and ineffective and expensive solutions, and a few overall and coordinated plans. However, none of these have even been accepted as the solution, to say nothing of having any part of these plans effectuated. We are, therefore, no better off today than we were 30 years ago when the two states decided that the problem was so serious as to warrant the creation of an Authority to solve it.

"Today the situation is very much worse than it was 20, or even 10 years ago. Some railroad tracks have been taken up, many trains have been eliminated and in some cases as many as 50% fewer trains are being run than was the case 3 decades ago, while in some instances we only have about 10% as many, or even fewer, trains than we had then. Fares have more than doubled in the meantime, and train speeds have been reduced. Anyone with the understanding of the economic need of these regions must agree that we can not tolerate this condition any longer. We must take positive and effective action.

". . . We must stop trying to solve this vast and serious problem by introducing ineffective and poorly conceived half-way measures, and which always showed a large deficit, and we must undertake the task of solving it in the only and proper manner in which it can be solved. We must provide an overall solution, throughly coordinated, and include therein all possible revenue producing features and arrange the facilities in such a manner that the best possible and maximum use can be made. We must also stop using the poorly conceived projects as a base for

discussion, as has too often been done, and then simply say, it cannot be done. That is a very poor excuse for the past failure to produce the proper facilities." (Stip. 93-95) • • •

36. In the 1958 session of the New Jersey State Legislature, Assembly Bill No. 16 was introduced which provided that the Port Authority would take over and financially develop, improve and operate the interstate rapid rail transportation of passenger traffic between New Jersey and New York. In response to this bill, the Port Authority submitted a statement by its Commissioners on November 24, 1958. In a letter accompanying its statement, the Port Authority summarized its position:

"At the outset we must state, as we have stated repeatedly in the past, that we are unanimously opposed to the adoption of Assembly No. 16 or any legislation which would attempt to involve the Port Authority in any way in the deficits of rail rapid transit.

"Our letters of May 29 and September 11 and the attached statement, all contain detailed facts and figures that completely refute the unsound, impracticable and legally impossible recommendations of Assembly No. 16, which would attempt to direct the Port Authority to take over, finance, develop, improve and operate 'rapid rail transportation of passenger traffic' in the Port of New York District.

• • •

"In our judgment, any involvment of the Port Authority in rapid transit would have disastrous consequences for the people of the two States and for

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their joint heritage,—the Port District of New Jersey and New York. Such involvement would cause the Port Authority to default on contractual commitments which the Port Authority must honor for the continued development of the public facilities of the Port District—land, sea and air—which will require the Authority to borrow over $700,000,000 of capital funds during the next five years. These contractual commitments, made with the express authorization of the two States, involve the following of our facilities:

Elizabeth-Port Authority Piers
Brooklyn-Port Authority Piers
Port Newark
George Washington Bridge
(second level, plaza improvements and approaches)
Washington Heights Bus Passenger Facility
Bergen County Expressway
New York International Airport
Newark Airport
La Guardia Airport
Narrows Bridge
Erie Basin-Port Authority Piers

"In addition, any involvement of the Port Authority in rapid transit could well lead to the destruction of the Port Authority as a useful agency of the two States for the continued development of essential facilities on a self-supporting basis and without burden to the general taxpayer.

"It has been suggested: (1) that the heavy deficits of the New Jersey commuter railroads and the cost

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of developing a new and comprehensive rapid transit system should be assumed by the Port Authority, which could absorb these deficits by use of revenues from its present operations; and (2) that if these rail transit deficits—present and future—proved to be more than the Port Authority's overall revenues could absorb, they could be 'made up' by increasing the existing Hudson River tolls and discontinuing the present commutation rates across the George Washington Bridge and through the Holland and Lincoln Tunnels. It also has been suggested that such deficits could be made up by increasing the charges at Port Authority terminal facilities. Another suggestion calls for a bi-State (New Jersey, New York and Connecticut) subsidy to the Port Authority to make up the operational and capital deficits of rail transit.

"By way of summary of our previous communications and our current statement, we must respectfully submit to your Committees again that:

"1. It is legally, financially and contractually impossible for the Port Authority to assume the railroads' increasingly heavy deficits from all or part of commuter operations, or the cost of developing a new and comprehensive interstate rail rapid transit system.

"2. Even if it were legally and contractually possible, very quickly the assumption of rail transit deficits by the Port Authority, the self-supporting agency of the two States, would cripple and destroy the Authority's credit. It would thereby bring to a halt the program now being carried out by the Port Authority on behalf of the two

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States for the continued development of their essential public marine and inland terminal facilities, airports and interstate arterial systems.

"3. The imposition of the deficit financing of rail transit upon motorists would constitute an unfair tax upon a particular group of citizens. A toll increase to 75 cents for all automobiles, including those of regular commuters, and a corresponding increase for all other users of the Hudson River crossings would be required just to meet the 1957 deficits of the New Jersey commuter railroads. If these deficits were to be viewed realistically to include the financing of rapid transit deficits in New Jersey, New York and, as has been suggested, in Connecticut, the users of the Hudson River crossings, and we presume, other river crossings and turnpikes in the tri-State area, would have to pay a bill for railroad and transit deficits amounting to a sum that might reach as high as $150 million a year.

"4. It is impossible, as has been suggested, for the Port Authority to alter existing contracts for charges to users of Port Authority airports, truck terminals, bus terminals, and marine terminals, in any attempt to impose upon them a part of the rail transit deficits. These charges have been established by leases and agreements which may not be altered unilaterally.

"5. A New Jersey subsidy of the Port Authority for rail rapid transit purposes is a proposal that commuter deficits be paid by the taxpayers.

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We find it difficult to believe that this Legislature would support a bill that proposed that the taxpayers of the State of New Jersey should subsidize Port Authority operation to the extent of from $12 million to $20 million or more a year. Furthermore, the Port Authority would cease to be an effective instrumentality of the two States if it were to become a subsidized agency.

"In the attached statement we set forth our detailed reasons for these conclusions and describe how the Port Authority finances its projects, the way in which the market for its revenue bonds operates, and the projects to which it is committed over the next five years. Our statement also demonstrates the legal and financial impossibility of the assumption by the Port Authority of any or all of the rail transit deficits, and reviews how and why the assumption of such deficits would destroy Port Authority credit.

"To finance Port Authority projects we must sell revenue bonds. The security for such bonds is limited to the revenues which the Port Authority develops and receives from its public projects and from the reserves established from those revenues in accordance with the statutes and our contracts with our bondholders. People will buy Port Authority bonds only so long as they have confidence that our revenues will be sufficient to pay interest and principal on such bonds and create sufficient reserves for protection against contingencies and adverse devel-

opments that might impair the security of the Authority's bonds.

"Under our contracts with our bondholders, the Port Authority's reserves and the revenues from present facilities are pledged and committed. They cannot, as a matter of law and contract, be diverted to the development of a deficit rail transit system or for the underwriting of deficits of the New Jersey commuter railroads."

• • •

"Two results would flow from such continuing subsidy, possibly unanticipated by their proponents, but certainly destructive to the continued usefulness of the Port Authority.

"First of all, prospective investors of Port Authority obligations would conclude that the subsidized Port Authority operation was only a first step in a process of involvement, and that an attempt to divert the reserves and revenues of the Authority would be certain to follow. No investment counsellor who has heretofore advised his clients to purchase Port Authority bonds on the basis of its record of self-support could so counsel them again in the face of this threat. Port Authority interest rates would be forced up at once and at the very minimum certain public facilities, for which commitments have been made with the authorization of the two States, would have to be abandoned because the increased cost of borrowing would put them beyond the possibility of self-support.

"Your Committees well know that the essence of the Port Authority has been its long tradition of non-

political corporate management guided by sound business principles in the operation of public facilities which have been placed on a self-supporting basis. This tradition has been respected by successive administrations of the two States over the past 37 years.

"The Port Authority concept is completely incompatible with a power in the Authority to spend tax monies for the raising of which it would have no fiscal or political responsibility. In the case of tax-supported public facilities, the determination of the many considerations which are involved in their operation properly lie with the taxpayers who pay that operation. The Port Authority mechanism, while dependent on legislative authorization and gubernatorial control, must weigh operating decisions against their legal, financial and economic implications to the Authority. That mechanism, therefore, cannot at the same time fit both a subsidized railroad operation and the operations of self-supporting port facilities. The Authority could not possibly observe two standards of management with respect to its operations. The non-business considerations which are completely correct for setting policy for a tax-subsidized railroad operation could in no event be kept out of the agency's other operations, which would be managed by the same Commissioners and the same administrative staff. Thus, the ultimate result of a subsidy would be to destroy not only the self-supporting financial management of the Authority but also its managerial efficiency."

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37. The following is an excerpt from the statement by the Commissioners of the Port of New York Authority dated November 24, 1958:

> "The Commissioners of the Port Authority are unanimously opposed to Assembly No. 16 and to any other legislation which would attempt to involve the Port Authority in any way in responsibility for rapid transit.
>
> PORT AUTHORITY ASSUMPTION OF TRANSIT DEFICITS IS LEGALLY AND FINANCIALLY IMPOSSIBLE
>
> "This opposition is based on the conclusion of the Commissioners that: (1) It is legally, financially and contractually impossible for the Port Authority to assume the railroads' increasingly heavy deficits from commuter operations or the cost of developing a new and comprehensive rail rapid transit system; and (2) The assumption of rail transit deficits by the Port Authority, the self-supporting agency of the two States, would immediately cripple and very quickly destroy the program of the two States now under way for the continued development of their essential public port and harbor facilities, airports, and interstate arterial systems.
>
> • • •
>
> "In addition to the General Reserve Fund, various special reserve funds have been created as a result of contractual commitments with bondholders in support of the various issues of Port Authority bonds. As in the case of the General Reserve Fund, the Authority may apply moneys in the Special Reserve

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> Funds for purposes relating only to those of its bonds secured by a pledge of the General Reserve Fund, including purposes relating to facilities financed by such General Reserve Fund Bonds.
>
> "All Port Authority revenues not applied to operation and maintenance and debt service *must* be paid into one or another of these reserve funds. There are no excess revenues which are free of this contractual commitment to bondholders.
>
> "Generically, Port Authority bonds may be classified as 'municipal bonds'. However, the vast majority of municipal bonds are general obligation bonds secured by the tax levies of the particular unit issuing such bonds. The marketability of such bonds has little to do with the specific purpose of the particular issue but rests primarily upon the tax record and future prospects of the entire community within the taxing jurisdiction. Unlike tax-supported obligations, however, the marketability of the Port Authority bonds has a very direct relationship to the facilities for which the borrowing is made.
>
> "Moreover, in addition to the revenue prospects of the facility itself, the prospective Port Authority bondholder weighs the financial strength of the Port Authority by an examination of its record of meeting required and anticipated debt retirement, the Authority's reputation for financial management and its record of administration with respect to the ratios of expenses to revenues.
>
> "The factors enumerated above can be determined by examination of the record and simple calculation.

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Not so readily determined and identified, however, is the 'confidence' that the holders of Port Authority bonds have historically demonstrated. Three factors have contributed to this confidence. First, all groups of facilities, including those that were initially deficit facilities, have been brought into the area of complete self-support. Second, the Port Authority has always honored both its express and implied obligations to its bondholders. Third, its management has been characterized by stability and continuity and its financial policies have earned the respect of investors.

• • •

"Late in 1951 the Commissioners of the Port Authority met again with Governor Driscoll of New Jersey to discuss a suggestion which had been advanced that the Port Authority might undertake the financing of an electrified rail transit system between New York and New Jersey. The Commissioners noted the facts developed in the many studies which had been undertaken, including the conclusions of the New Jersey Legislative Committee of 1941, and expressed the conviction that any suggestion that the Port Authority was about to take over or to be asked to take over the interstate rapid transit service would have a most serious effect on its credit.

"The Port Authority Commissioners pointed out that the principle of self-support is the whole strength of the Port Authority's ability to carry forward the programs of terminal and transportation development entrusted to it by the two States on a revenue bond basis; that the Port Authority's

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credit structure would be seriously impaired if there was any implication that the Port Authority was even considering the financing of rail transit; that any amendments to the Port Compact under which the Port Authority would have recourse to public subsidy from tax levying sources in support of its projects would destroy the entire concept and character of the Authority.

"Disastrous Effect Upon Port Authority Credit

"Even if it were possible to ignore the legal and financial impossibility of the Port Authority assuming responsibility for commuter rail deficits as described above, such involvement would have a disastrous effect on Port Authority credit. This statement represents not only the considered judgment of the Commissioners of the Port Authority, but it is supported by views expressed by other responsible persons in the investment and banking field, who as a practical matter, are the controlling influence upon the receptivity of bondholders to Port Authority investment. Their views are uniform that the introduction of rapid transit deficits into the Port Authority's overall financial responsibility would have the effect of seriously impairing the Port Authority's credit standing.

"For instance, Mr. E. B. Rockwell of Halsey, Stuart and Company (co-managers of an investment banking syndicate which consistently bids on Port Authority bonds) wrote to the Treasurer of the Port Authority on July 23, 1958 as follows:

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'In our opinion any assumption of responsibility on your part for rail rapid transit in the New York area would, on almost any conceivable terms, be harmful to the present investment standing of the Port bonds and would adversely affect the ability of the Port Authority to finance in the future on terms as favorable as hitherto. In our opinion, it is most essential for the preservation of The Port of New York Authority to be completely free of any responsibility whatsoever for rail rapid transit in this area.'

"Mr. Reginald M. Schmidt of Blyth and Company (co-managers of another syndicate which consistently bids on Port Authority bonds) also wrote to our Treasurer on July 16, 1958 in part as follows:

'If the Port of New York Authority is to continue expanding its present facilities and other facilities that lend themselves economically to sound revenue bond financing, it would be fatal to the Port's credit if they undertook to finance transit systems by pledging its surplus revenues and general reserve fund.'

"In support of the statements made by these municipal bond experts who both underwrite and purchase our bonds, we quote in part from an editorial from the June 30, 1958 edition of 'The Daily Bond Buyer,' which is the trade paper for municipal dealers all over the country. This editorial stresses the serious effect which transit responsibility would have on the Port Authority's credit.

'One of the few real efforts toward a solution of the mass transportation problem of the New York-

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New Jersey Metropolitan Region has been delayed because the New Jersey Legislature has adjourned until next November, without completing action on the proposed formation of the Metropolitan Transit District. An identical bill was adopted by the New York Legislature early this year and signed by Governor Harriman, but it will take effect only if New Jersey also acts. The measure squeaked by the New Jersey Senate, but the chances of approval by the Assembly are believed to be dim.

'It is regrettable that formation of such a bi-state agency, comparable in some ways to the Port of New York Authority, will be delayed and perhaps defeated in the end. Mass transportation is the universal problem of the "exploding cities" of the United States and many other countries. In the United States it is more formidable than anywhere else. Ever more penetrating studies show that it has some general aspects, but also many that are peculiar to each separate Metropolitan Region.

'The Port of New York Authority has often been assailed for its aloofness, but the Port Authority has excellent reasons and spelled them out plainly early this month in a series of analyses of commuter railroad deficits, the experience of transit systems in other Metropolitan Areas, and the effect on its own credit and activities of any attempt to participate. As to the latter, there are impassable legal obstacles and the financial results would be ruinous. The Port Authority therefore frankly declared that creation of the proposed

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Transit District is the only action that can assure progress this year on the New York-New Jersey transit problem.'

"These statements were made by responsible investment banking leaders. For all practical purposes they are the controlling influences of our credit. We can sell Authority bonds only through these syndicates and on such terms as the syndicates believe are required to make them marketable.

"Obviously, these market analysts would regard any Port Authority involvement in rapid transit as a financial disaster. If the Port Authority can be compelled to assume a deficit operation of any sort, even one not approaching the rail transit deficit in size, investors would have a right to assume that the Authority was becoming the dumping ground for deficit operations of all types. The Authority's credit could not survive such a breach of its investors' present confidence that the Port Authority will restrict its operations to facilities which it believes can eventually be made self-supporting. The importance of this lies in the fact that it transcends arguments as to the size of the present transit deficit. To investors it would make no difference whether the proposal was to force a $2,000,000 or a $12,000,000 or a $20,000,000 annual deficit on the Port Authority. Confidence is the essence of credit and it would be gone.

"Flattering though they may be, suggestions that the Port Authority's 'technical know-how and managerial experience' would somehow dissipate rail transit deficits will not stand serious examination. Nor would prospective purchasers of Port Authority obligations be lulled into disregarding the uniform record of large and increasing rail transit deficits by the mere fact that the Port Authority's 'managerial experience' had been brought into the picture.

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"The impact of a loss of credit would not be limited to the Port Authority's future financing. Outstanding bonds would immediately sell at a discount and the holders of the $500 million of outstanding Port Authority bonds, who purchased them on the assumption that only those facilities would be undertaken which are self-supporting or capable of self-support, would suffer serious losses. At the very minimum this involves a breach of the Authority's moral obligation to these bondholders and one which the Legislatures will want to consider."

38. On January 9, 1959, a joint report on the proposed Metropolitan Rapid Transit District and Port Authority statutes was issued by the New Jersey Assembly Committees on Highways, Transportation and Public Utilities and on Federal and Interstate Relations. The report noted that the MRTC bill did not specifically mention the Port Authority by name as it did other agencies, such as the New York Transit Authority; that the implicit proposal of the Metropolitan Rapid Transit Commission bill to use local property taxes as the primary method of financing "was a wholly unrealistic proposal [as] the municipalities and counties comprising the district . . . are now involved in a substantial effort to find a way to reduce the tax burden on real estate"; the proposed organizational structure of the

Metropolitan Rapid Transit District was "most disturbing" and "provided less control over the Board than exists in the hands of stockholders in a private corporation"; and that supporters of the Metropolitan Rapid Transit Commission plan had come to recognize the many serious defects in the structure of the agency and otherwise. The report also stated that many of those who originally felt that the Port Authority should undertake the entire mass transit obligation had come to realize that in light of all the circumstances that could not be justified at that time. The report further stated:

> "There can be no question that the carrying on of a transit function was well within the Port Authority Compact terms and well within the present powers. However, two extremely important factors mitigate against any present assignment of the task to the Port Authority by law. First, as of now no one can say with certainty what the size of an operatinp deficit would be. While the Port Authority no doubt could undertake an activity which would involve a deficit—even a permanent one—it could only do so if there were real assurance that the size of the deficit would be such that there could be no doubt of its ability to absorb it. As pointed out by the Supreme Court in the *Weehawken* case, 14 N.J. 570, the design of the Port Authority rests on two concepts: that by a pooling of facilities in one agency, activities which by themselves could not succeed financially could be undertaken, and that the aggregate pooled operation of all facilities should be self-supporting. It is this last factor that mitigates against A-16. If there were sufficient assurance that

> the aggregate operation would continue to be self-supporting, and sufficiently so as not to tend to impair or adversely affect the efficiency or credit of the Port of New York Authority, it would be a question of policy for the Legislature to decide whether to assign to the Port of New York Authority a function that would make it more expensive to borrow money. The committees are satisfied that this is the context in which Mr. Tobin's testimony that the Port Authority could not, legally or financially, undertake commuter operations, must be read. The same comment is to be applied to the Memorandum of Understanding between MRTC and the Port of New York Authority. There can be no doubt of the propriety of assigning a transit function to the Port Authority if there were proof of an adequately clear and convincing nature by competent estimates that the predictable deficits of the transit operations would be sufficiently less than predictable net revenues from other operations as not to impair existing contractual obligations with bondholders or the overall ability, credit and efficiency of the Port of New York Authority. Evidence of this kind was not presented, nor can it be until there is formulated a general plan with sufficient detail. At that time, reasonably reliable estimates will be possible, and the Legislature can then determine whether and to what extent the Port of New York Authority should be directed to undertake a major operating or financial role in its effectuation. The concept of a transit district agency was accordingly agreed upon as the most suitable one to accomplish the task.

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"At the same time, it was felt that the Port Authority should give the district every conceivable aid that might advance its work, and the substitute bill expressly so provides. We have no doubt that the Port Authority can be of tremendous aid and it is in the public interest, as well as in the proper discharge of its own duties that it will provide it wholeheartedly. In addition, it is conceivable that some kind of Port Authority participation in some part or parts of the plan is desirable and feasible without requiring it to assume the entire deficit. This is most likely to take the form of planning, constructing and financing some of the essential facilities. Some of them may even be modest deficit operations of a predictable nature, such as parking facilities at junction or transfer points, at rail line stations, or more substantial ones such as stations, interconnections, bridges, tunnels and the like, with the assurance, however, that Port Authority contractual obligations to bondholders and overall efficiency and credit would not be impaired. It may even be able, at the start, to provide office space for the district so that it may get quickly under way.

"At the emergency and interim stages, it is clear that implementation, in the sense of actual operation, should continue to be by the railroads and other carriers. The district will serve as a focal point or integrating device through which all arrangements may be made. Conceivably, it could arrange for issuance of the passenger tickets for use on the commuter network, if that should offer any cost-saving advantage. Beyond these two stages, however, no one can predict what assignments should be made.

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Implementation of the more permanent general plan will need to await the experience obtained from the interim plan and the design of the general plan itself. The substitute bill is drawn to provide all needed flexibility."

39. By Chapter 13 of the Laws of New Jersey of 1959 and Chapter 420 of the Laws of New York of 1959, the States of New Jersey and New York entered into a compact with the consent of Congress. Public Law 86-302; 73 Stat. 575 (1959). The compact created the New York-New Jersey Transportation Agency as a body "corporate and politic" which would "serve as a public agency of the states of New York and New Jersey in dealing with matters affecting public mass transit within and between the two states." §3.1. In entering into this compact, the Legislatures specifically found:

"Provision for efficient and proper transportation of commuters and other persons by public transit methods within the New York-New Jersey metropolitan area is essential in the public interest.

"Recent trends toward decay of existing systems, particularly in respect to transportation services crossing the Hudson river, have created a condition of impending emergency requiring prompt action on an interim basis for the establishment of an operating system designed mainly on the best use of existing facilities and equipment at the least financial hardship upon the operators thereof consistent with public needs, pending the development of a proper and acceptable general plan.

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"Present uncertainties as to the nature and extent of any acceptable and feasible general plan, as well as to the capital and operating cost of the same, require that such questions be inquired into upon the basis of experience accumulated in the operation of an interim plan. The preparation and execution of an interim plan as well as the preparation of a general plan can and should be accomplished by a metropolitan transit district to serve as a regional agency of the States and to have the full assistance, support, co-operation and participation by all persons and agencies, private and public, of any 1 or more of the States within the proper limits of its own functions and duties." (Stip. 110-126) • • •

40. On September 21, 1959 by Public Law 86-302, 73 Stat. 575, Congress, pursuant to a joint resolution, consented to the Compact entered into between the State of New York and the State of New Jersey for the creation of the New York-New Jersey Transportation Agency. The congressional consent provided:

(a) The right to alter, amend, or repeal the joint resolution was expressly reserved.

(b) Any long-range plan, when adopted by concurrent legislation of the compacting states, shall be submitted to Congress for its consent before such long-range plan becomes effective. (Stip. 127) • • •

The Compact provided that the agency was to continue in existence until June 13, 1961, but that its existence could continue thereafter as concurrent legislation might provide (Article 4, §4.6). In 1961 the Legislatures of both States

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extended the agency's duration to June 30, 1966. Ch. 55, Laws of N.J. 1961; Ch. 273, Laws of N.Y. 1961. There was no subsequent legislation extending the existence of the agency beyond 1966.

41. By Chapter 25 of the Laws of New Jersey of 1959 and Chapter 638 of the Laws of New York of 1959 the Legislatures of the two States provided that "upon the election by either State . . . the Port Authority shall be authorized and empowered" to purchase and own railroad cars for the purpose of leasing them to commuter railroads within the electing State. The statutes expressly prohibit the Authority from borrowing money for the purchase of such cars until the electing State has guaranteed payment of both principal and interest on the obligations issued for that purpose.

New York immediately chose to have the Port Authority proceed on its behalf to purchase railroad cars for lease to the commuter railroads of that State. Ch. 639, Laws of New York of 1959. Pursuant to this program, as later implemented by a 1961 New York constitutional amendment, the Port Authority has presently outstanding over $90 million in New York State-guaranteed railroad car bonds and has purchased for lease to commuter railroads within the State 467 air conditioned passenger cars and 8 locomotives. 1972 Port Authority Annual Report, 15. The State of New Jersey has not taken legislative action to participate in this commuter car program.

42. By Chapter 14 of the Laws of New Jersey of 1959, a Division of Railroad Transportation was created and established as a part of the State Highway Department in order to improve rail transportation in the State. The Legislature found:

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"(a) Many of the railroads serving this State are seeking to curtail or eliminate much of their commuter and passenger railroad service.

"(b) Railroad transportation is the most efficient means of moving large groups of people in a short space of time such as is necessary, particularly, during the rush hours at the commencement and close of each working day.

"(c) Adequate commuter and passenger railroad service throughout the State is essential for the welfare and prosperity of the people of the State.

"(d) It is therefore imperative that the State lend its assistance in seeking a solution to the problems confronting the railroads in connection with commuter and passenger service and to insure continued operation of adequate commuter and passenger railroad services." (Stip. 128-130) •••

47. In 1960 the New York City Transit System had an operating deficit in excess of $20 million, exclusive of annual debt charges of $87 million which was subsidized by the taxpayers of New York City. The aggregate deficit from commuter operations of the New York Central, New Haven, Long Island Railroads and Staten Island Rapid Transit Railway was estimated at between $10 million and $15 million annually for the year. New York City taxpayers' subsidies of the Staten Island Ferry operations were approximately $6 million. Thus, in 1960, the total of commuter railroad and rail transit deficits in the New York-New Jersey area approached $128 million of which $87 million was for capital debt charges.

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48. On January 1, 1962 the Division of Railroad Transportation, New Jersey State Highway Department, issued its Second Annual Report and Recommendations entitled "Will We Emerge?"

> "The rail carriers' 'illness' has become a progressive one, reaching a crisis in the last decade. In our own State, as in some other sections of the country, railroads were caught in a squeeze between rising costs and declining income. The State and the municipalities have been reluctant to allow the railroads to be relieved of property taxes. Grandiose plans developed by worried officials, numerous traffic consultants and private groups have also been ineffective. The Public simply was not convinced that the situation was serious enough to warrant the expenditure of the hundreds of millions of dollars most of the transit plans required."

THEN AND NOW

"The Public's attitude appeared to be 'Why worry?' It was easier and more 'entertaining' to complain about transit deficiencies than to do something about them before they became a serious menace.

"New Jersey railroads grasped at a 'last, drastic remedy' for survival. In an attempt to avail themselves of the advantages of the Federal Transportation Act of 1958, some lines applied to be relieved of passenger operations, specifically commuter service. Unless this could be accomplished, they warned, they would have to go out of business.

"Realizing that loss of rail commuter service would be a blow to our State's economy far more serious

than any natural catastrophe yet experienced, our State Administration determined to do something about assisting the railroads. Prior attempts had met with general public apathy, and even antagonism in some quarters. The 'sins of the father'—dating back to some of the early railroad promoter tycoons —had left their imprint on the public mind.

TRANSPORTATION DIVISION

"Accordingly, a Division of Railroad Transportation was created within the Highway Department and given a two-fold task—to preserve essential rail service and to improve it where possible. The New Jersey commuter crisis of 1958-59 created a problem which could not be 'put on the shelf' as had been the practice over the years. The New Jersey Highway Department, possessing a background of experience with transportation in its broadest sense, knew full well the futility of even attempting to accommodate the tremendous volume of this 'Corridor State' on its existing highway system.

"The first stage of the project—a 'stop-gap' action only—has been accomplished. The State contracted with the carriers for continuation of essential passenger service for the fiscal year 1960-61 and again, without any appreciable fare increase, until August 29, 1962.

SERVICE ASSURED

"Rail transportation for our citizens has thus been assured by contract payments—subsidies, if you will. A definition of subsidy reads: 'A government grant

to a private enterprise considered of benefit to the public.' The action taken and the incentive could not be better expressed.

"The Highway Department, cognizant of its responsibility for the movement of people and of goods by all available means of land transportation, has to date furnished some twelve million dollars from road construction funds for this purpose.

"Had the Department not made this sacrifice of the equivalent of two miles of highway (average cost of N.J. modern highways is $6,250,000 per mi.), it would have been faced with a shut-down of rail passenger service and the impossible task of making immediately available adequate highways to accommodate an additional 266,000 passenger trips daily. This just couldn't be done, either from the standpoint of funds or time.

• • •

"After a considerable period of successfully avoiding all attempts to involve it in rail transit, the Port of New York Authority was finally persuaded by our Division of Railroad Transportation to assume the acquisition, rehabilitation and operation of the H & M, even though the revitalized line might fail to record a profit. The Authority still resisted extending its operations beyond H & M's main stem necessitating further forceful negotiations before extensions and rail transfer stations were included.

"Rehabilitation of this vital interstate commuter facility must be assured before other programs outlined herein can be initiated. It would be the height

of folly to proceed with such improvements without first taking this essential step.

"The Port of New York Authority, its fiscal structure maintained by income from tax-free vehicular crossings of the Hudson River largely at the 'expense' of rail transportation, is the proper agency to rehabilitate the H & M and provide suitable extensions to connect it with other North Jersey commuter railroads. The Division is negotiating terms of necessary legislation with the State of New York and the Port of New York Authority to accomplish this."

B. Acquisition of the Hudson and Manhattan Railroad Company by the Port Authority

1. In 1908, the Hudson and Manhattan Railroad Company, a privately-owned concern, began operating a railroad facility between Hoboken and Manhattan. Service between Hudson Terminal and Jersey City commenced in 1909 and the service was extended to Newark in 1911. The Railroad was in financial difficulty for many years, and although formal bankruptcy proceedings against it did not commence until 1954, the Railroad was insolvent from the early 1930's.

2. In 1959 the United States District Court for the Southern District of New York approved a reorganization plan which left the company with enough cash to continue operations for two years but without funds to provide needed capital improvements. *In re Hudson & Manhattan R.R.*, 174 F. Supp. 148 (S.D.N.Y. 1959), *affirmed sub. nom. Spitzer v. Stichman*, 278 F.2d 402 (2d Cir. 1960). (Stip. 136-140). • • •

3. In 1960, the New Jersey Senate created a bi-partisan committee under the chairmanship of Senator Frank S. Farley (the "Farley Committee") to conduct "a full and unlimited investigation" of the Port Authority. The Committee was authorized and directed to study "the entire financial structure and operations" of the Authority and to determine "whether or not the said Port of New York Authority is fulfilling its statutory duties and obligations." (Senate Resolution No. 2, 1960; Senate Resolution No. 7, 1961)

4. During the Farley Committee hearings, Dwight R. G. Palmer, New Jersey State Highway Commissioner, testified on January 26, 1961 in part as follows: (Stip. 141-42)
• • •

"There has been a multiplicity of studies, countless commissions and associations engaged in surveys of our metropolitan areas. A perusal of these reports impresses one with the great detail and statistics of the majority of the reports. The supervisors of such compilations undoubtedly were sincere and felt they were pursuing the proper course and yet, years after all these facts were presented, we find ourselves about to go 'down the drain' trafficwise.

"Most of these plans proposed expenditures that staggered the imagination. The likelihood of ever converting such plans into 'pay dirt' and a practical solution had about as much chance as would the financing of Captain Stormfield's visit to Heaven, as described by Mark Twain.

"So, gentleman, in 1959 our commuter problem was brought into sharper focus by the action of the U.S.

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Supreme Court permitting the New York Central Railroad to discontinue ferry service from Weehawken to Manhattan. This same year a rush of service curtailments and fare increase petitions flooded our regulatory agencies and one of our busiest New Jersey commuter railroads posted notice that all service would be discontinued.

"Governor Meyner then assigned the problem to me, first directing my associates and me to provide vehicles of transportation for those 3,000 odd commuters that otherwise would have been stranded when the Weehawken ferry shut down. Within a few months our Legislature responded by establishing the Division of Railroad Transportation. We had adopted a new philosophy; that the job of the Highway Department was one of moving people and goods —not just providing highway alignments for vehicles to travel. This concept was the keystone of the integration of transport facilities in New Jersey, for we recognized that the suburban railroads were essential allies of the Highway Department in meeting the daily peak travel demands of our citizens. We had not worked long with the problem before we realized that the essential ingredient needed to aid in the solution of our problem was money. Conscious of the general rejection of the Metropolitan Rapid Transit Commission plan to tax real estate to meet deficits in its proposals, we developed a different approach. An examination of the operation of the New Jersey Turnpike indicated the availability of sufficient surplus funds to take care of rail transportation difficulties as well as other transport needs, and do this after meeting commitments to all holders of Turnpike

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securities. However, the public decreed otherwise and denied to us the use of these funds. After the defeat of the referendum we reviewed our studies of the rail passenger situation. The results of these studies were set forth in detail in our report to the Governor and Legislature dated April 4, 1960. This report recommended that in order to forestall a complete breakdown of rail services that the carriers be placed under contracts to operate specified trains at established rates. The contracts, we hoped, would assure a continuity of service for our citizens even though they were considered a 'temporary expedient' to be pursued, say, for a period of three to five years, during which time a long range improvement plan could be put into effect.

"Legislation enabling such contracts was introduced in the Senate in May of 1960. It was passed with dispatch in both houses, the legislature exhibiting a keen understanding of the problems and the seriousness of the consequences should the State fail to take action to ease the financial burdens of the rail carriers.

"In the north metropolitan area our recommendations included consolidation of the Jersey Central and the Pennsylvania passenger services over the New York and Long Branch operating the trains through to Pennsylvania Station, Manhattan and a rerouting of all the main line service of the Jersey Central to Penn Station in Newark. Certain of these suggestions are still under study. We also recommended that the Port Authority play a significant part in improving the facilities for the interstate

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movement of our citizens. In this regard I am fully aware that there are those who suggest that the Port Authority should take over the financial responsibility and deficits of all commuter railroads in New Jersey and New York even at the risk of jeopardizing the Authority's credit standing and depleting its reserves below levels set by indenture agreements.

"Considerable time has been devoted to reviewing the Port Authority's capabilities, as well as responsibilities, insofar as commuter rail transit is concerned. Our conclusion as stated in the April [1960] report was that:

'The Port of New York Authority should not, in our opinion, be handed New Jersey's rail problem, nor should it become responsible for the New York subway system or for rail transportation for Westchester or Long Island. We are certain however, that the interstate aspects of the rail movement of persons and goods such as purchase and lease of new Hudson and Manhattan commuter cars and the purchase of the existing interstate railroad ferry boats, do come within their obligations. The foregoing fully recognizes the importance of maintaining the Port of New York Authority's commitments and credit requirements.'

"In other words, we became convinced that the Port Authority's responsibility in the rail transit field should be concerned principally with the interstate aspects of the problem as the Authority is an interstate or bi-state agency. Our recommmendations were consistent with that philosophy.

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"I arrived at this conclusion relying on years of experience in private enterprise. My career has been one of a business man in the industrial field where the courageous survived—where the complacent were left behind and where competition took care of the rest. I have had responsibilities of meeting a payroll—a payroll that each year sought to improve the standards for our workers—and to satisfy the demands of shareholders also. The Port Authority in my opinion must make money and accumulate reserves for the rainy day if it is to be equipped to meet the needs of our two states of New York and New Jersey. It does not have general taxing powers. Its only taxes are the tolls it collects from the users of its facilities. Its shareholders are the public, you and I, and the institutions that buy the bonds. Since the cost of financing often determines the feasibility of a project it stands to reason that you and I get more for our toll dollar in the way of modern and safe facilities if we make certain that the credit rating of the Authority remains intact. Now let's talk specifics for a moment. The Authority has sizeable revenues and reserves today. While I don't have the 1960 figures, reports are that gross revenues in 1959 totaled $105 million and the several reserve funds totaled $71 million. Now as soon as 'reserve funds' are mentioned it is assumed by some that such reserves are 'available' or uncommitted. Such is not the case. These revenues and reserves are pledged and committed by contract to the investors in Port Authority bonds as security for the re-payment of those bonds and for contingent liability in connection therewith and they

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may not legally be diverted. For instance, to strengthen its credit position the Commissioners of the Authority have adopted a policy to commit retention of reserves in an amount equal to two year's debt service. The $71 million in all Port Authority reserve funds at the end of 1959 was just about equal to the following two year's debt service on all bonds. The Authority is required to hold in reserves 10% of its outstanding indebtedness—this amount at the end of 1959 was $57 million. Such revenues and reserves cannot be regarded as uncommitted funds. Diversion of these funds moreover might jeopardize the carrying out of future work authorized by the Legislatures of New Jersey and New York by inviting higher financing costs. Certainly the consequences of such an effect, from the standpoint of the growth and prosperity of this area, must be carefully considered.

"The matter of the pooling of net revenues from all the Port Authority's facilities, as authorized by the Senate in 1931, has received some attention of late. By pooling the revenues, a credit base was established to facilitate financing of projects like the bus terminal serving New Jersey commuters, the third tube of the Lincoln Tunnel, the Hoboken Piers, Port Newark, Port Elizabeth and Washington Heights Bus Terminal which will principally serve New Jersey commuters. Indeed, it is the pooling of such revenues, as I see it, that will permit financing the purchase and rehabilitation of the H & M Railroad. It is clear to me that the action of the New Jersey and New York Legislatures in author-

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izing the pooling of Port Authority revenues and the creation of reserves has made it possible to provide many public transportation facilities that we may not have had otherwise. With the needs for expanded and additional transport projects rearing up in every direction it seems that the principles which enabled the Authority to accomplish so much in so short a time and so efficiently should prevail.

"Now most of us realize that the matter of credit is not an exact science. The credit of an organization depends on quite a few factors; past performance, efficient management and caliber of personnel and markets for the product the institution has to sell; and last but not least—what investors think of the operation as a financial risk. It is, in the final analysis, the practical assessment of being repaid money that they lend to it. This latter reason, I am certain, is why the Port Authority last September, in presenting to this Committee the plan to acquire the Hudson and Manhattan Railroad, talked in terms of what might be done rather than to state positively what would be done. You will remember that they said the Port Authority might be able to sell bonds for the acquisition and modernization of the Hudson and Manhattan Railroad and at the same time continue the financing of the States' vital port development programs, provided investors could be given assurance that investments in rail transit matters would be limited. The Authority also wanted assurance that the key recommendations in our April report would materialize and pointed out that fair financial terms for both the purchase of

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the H & M properties and the Pennsylvania Railroad operating agreements must be obtained. As I see it from my personal point of view acquisition of the H & M is a must. All our plans hinge on it. To insist on terms unacceptable to investors or terms that invite high interest costs might cause delays that will render our efforts 'too little and too late.' It gets down to how badly we need the H & M—do we want it on the investors terms or not at all—it seems to me it is almost as simple as that.

"The H & M railroad provides a vital link in our interstate transport network. It is essential to both states that it not only continue but that it be rehabilitated to more conveniently serve our citizens. The cost of purchase, renovation and a new fleet of cars may be over $80,000,000. The H & M is in the last phase of reorganization, that when accomplished, will separate the Manhattan Real Estate from the Railroad properties. The reorganization document now before the I.C.C. provides that sufficient cash be transferred to the separated Railroad Company to permit normal operation for a period of only two years. Extraordinary demands on its resources such as a prolonged strike, would substantially shorten the period it could operate without public assistance. We did not include the H & M in our contract program because of its interstate nature. We have insisted that it be put under bi-state regulation and that its rehabilitation be a bi-state venture. The Port Authority is the logical agency to do this—it has agreed, as just outlined.

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"I feel certain that you gentlemen of the Legislature have been and will be increasingly in touch with our transportation needs. I am also convinced that the Port Authority's responsibilities will be better met by preserving a sound credit base. (Stip. 142-48) • • •

"Q. By Senator Farley: And taking a hypothetical case—if perchance the Port were in a position financially to handle the commuter service, what would happen to the railroads involving passenger and freight service in this particular area of northern New Jersey? Would they go bankrupt?

"A. Well, the Port Authority has gone on record as feeling that mass transportation's maintenance is absolutely essential. That is contrary to some of the references that I have seen recorded. The Port Authority in itself, with its bridges and its tunnels, and its H & M could, under no circumstances in our considered opinion—although we are not experts, sir—meet the needs of our State insofar as transportation is concerned, and in our opinion their efforts should be confined to the bi-state, interstate aspects, and we, with the carriers themselves, energizing the assistance in each state, would not certainly from our state interest in the Port Authority wish to see them engage in taking over the Long Island Railroad, the New Haven that comes into Manhattan, and the New York Central with all the extentuating circumstances. (Stip. 149-50) • • •

"Q. By Senator Dumont: Commissioner, when the Port Authority made its proposal in September,

at our hearings then, to take over the Hudson & Manhattan Tubes, they surrounded their proposal with certain restrictions which, so far as I could tell, were designed to eliminate any real obligation on the part of the Port Authority beyond taking over the Hudson & Manhattan Tubes, at least so far as the railroad field was concerned. Do you consider those restrictions that they surrounded this proposal with as reasonable ones?

"A. Yes, I do. And I have so stated in my proposal and I do it purely on the basis of what experience I may have had in the field of finance and industry, and of what we are hoping to obtain and acquire in the future in the expansion of facilities that the Port can supply.

"Q. So that you feel if they were to carry out this proposal and purchase the Hudson & Manhattan and do all the rehabilitation that's necessary, they would be doing a, shall we say, satisfactory job, at least in your opinion so far as carrying out their obligation in the railroad field?

"A. I would say this: 1. That they would be doing a fabulous job and accomplishing something that has been talked about for 40 years and which no one as yet has had the courage to tackle and which now is within our grasp. My feeling also is this, in talking with various Commissioners and talking with people in the financial district, that this is not a decision of the Port Authority as such, of a rebellion against going further into transportation, but of the investor, you and I if you will, although we are not

investing this morning whether or not we are willing to loan money to finance obligations that have such distressing characteristics as the present situation. And even the Hudson & Manhattan, which some believe can be brought into a position of profit, which with what little I know I greatly doubt,—it is presently contemplated that there will be a loss of at least some $5 million a year in that operation, and probably a total laying in of risk capital of some $80 million. And it seems impossible, from all of my direct—and not through any other channels —direct contacts, to observe that money could be loaned for even the acquisition of the H & M in the event there was not some assurance that this just wasn't one bite of the cherry and that further transportation business was all to be pulled together. I think it's simply a question of whether the investor says yes or no and at the present time my observation is that the investor says no unless he has that limitation.

"I think, so far as the Port Authority is concerned, that [if] the State felt that they wanted to guarantee the bonds, the investor's bond, then the investor, of course, would be tickled to death to do it. And I think that their capabilities and efficiency are perfectly adequate to even tackle such an encumbrance as this whole transit situation."

5. The following is an excerpt from the testimony before the Farley Committee on January 26, 1961 of E. T. Moore, then President of the Central Railroad of New Jersey:

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"The Port Authority should be just as willing to promote and help to retain essential freight and passenger rail transportation as they are to promote highway and air transportation. The Port Authority is currently sponsoring a study, with the cooperation of railroads, for the consolidation of the railroad marine operations and if this study indicates that such a consolidation is economically sound and in the public interest, the Port Authority should assist in bringing it about. I believe, however, it would be most unwise to expect the Port Authority to take over the whole burden of mass transportation in the New York metropolitan bi-state area.

"The Port Authority, historically, has had the obligation of providing bridges and tunnels for a convenient crossing of the Hudson River. Their extensive facilities have syphoned the profitable portion of this trans-Hudson traffic from the railroads who originally provided the sole means of the river crossing. They should now take the unprofitable with the profitable and assume their full obligation of providing whatever facilities might be essential in the public interest to transport people and vehicles across the Hudson between New Jersey and New York in the metropolitan area. The Port Authority should unquestionably acquire and rehabilitate the Hudson & Manhattan Railroad, which would eliminate the need for antiquated ferry service which is expensive to operate and does not meet present-day transportation needs."

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6. Port Authority Commissioner James C. Kellogg testified at the Farley Committee hearings at the request of and on behalf of all of his fellow Commissioners. The following is an excerpt from his testimony on January 27, 1961:

> "On November 24, 1958, the Commissioners, appearing before a joint hearing of two Committees of the New Jersey General Assembly, submitted a rather complete outline of our views of the rail commuter transit problem and transit deficits. We reviewed the Port Authority's continuing studies of the rapid transit problem in this bi-State metropolitan area over the past thirty years and we submitted a summary of the experience of other metropolitan areas in dealing with their own transit problems. Our report also reviewed the reasons why the Commissioners had no choice but to be unanimously opposed to the adoption of any legislation which would have attempted to involve the Port Authority in the deficits of commuter railroads and rapid transit without limitation or other assurances.
>
> "At the outset, I would like to re-affirm our view that both rail and highway transportation are essential to the economic welfare of the people of the New Jersey-New York metropolitan region. It was for this reason that the Port Authority made $800,000 available to the Metropolitan Rapid Transit Commission to undertake a comprehensive interstate transit survey. We do not now, nor have we ever regarded arterial highway or our own bus terminal services for the accommodation of New Jersey commuters as substitutes for a program of maintaining

and improving rail passenger facilities between New Jersey and Manhattan and throughout the Port District.

"No single one of these programs is a substitute for any of the others since each is important in handling various types of passenger traffic at different times of the day and of the week. An analysis of the relative numbers of passengers using the various modes of trans-Hudson transportation clearly illustrates this point. The automobile plays a significant role in the handling of trans-Hudson passengers on week ends and in non-commuting hours, as it does throughout the nation. The great importance of the common carriers in trans-Hudson commuter transportation becomes apparent, however, from an examination of the relative passenger volumes during the rush hour each weekday. In that hour only 15 per cent of all trans-Hudson passenger movement to Manhattan is by automobile, and more than half of these automobiles are destined for points other than the central business district of Manhattan south of 59th Street. The balance of this peak-hour traffic into Manhattan, 85 per cent, is handled by mass transit—that means railroads and buses, with 46 per cent of the passengers served by rail and 39 per cent by bus.

"Thus, there is no question that rail services are of extreme importance in terms of commuter travel. At the same time, as we suggested to the Legislature in 1958, an attempt to solve the problem of improving commuter rail facilities would be of no value if it were to result in the destruction of the ability of the

Port Authority to continue its comprehensive program of providing, on a self-supporting basis, the indispensable modern port, transportation and terminal facilities. For without these essential facilities, the Port of New Jersey-New York could not continue its predominant position and assure the future prosperity of its people.

"For more than thirty years, the Port Authority has been engaged in studies of all aspects of terminal and transportation facilities and services within the New Jersey-New York metropolitan area. We have continuously searched for solutions to the commuter railroad problem in the form of physical plans which could adequately serve the commuting public and which, at the same time, could be developed on a self-supporting basis. These studies and our conclusions have been submitted to the Legislatures of the two States. No formula for making commuter railroads self-supporting in this area or in any other metropolitan area throughout the country, has ever been found either by the Port Authority, any other public agency or the railroads themselves. All of these studies of rail transit inevitably have concluded that their operation and improvement involve large deficits and that public financial assistance or subsidy is the only method of continuing these critical public services.

"There is universal agreement that essential commuter railroad services must be maintained. For New Jersey and New York, the years 1959 and 1960 were highly significant in the long history of the problem. For the first time, public assistance to all

the Port District commuter railroads has been forthcoming through constructive programs developed in both States. In New York, programs providing for tax relief and for new commuter cars for the New York railroads are in force, and Governor Rockefeller has just announced a four-state program to keep the New Haven Railroad in operation. In New Jersey, a total of $6,000,000 of State funds in the current fiscal year has been appropriated for allocation to the commuter railroads under annual service contracts which guarantee the continuation of this State's essential railroad services.

"In contrast, however, the Hudson and Manhattan Railroad, the interstate rail transit link, has been excluded specifically from the programs of both States for financial assistance to the railroads. Yet it has been experiencing the most serious financial difficulties. Indeed, it is now emerging from bankruptcy under a plan of reorganization which makes it doubtful that the railroad could remain in operation for more than two years.

"The Port Authority always has maintained that the H&M must be kept in operation. This railroad handles more than 31 million passengers a year. Of its 55,000 daily passengers in one direction, it regularly carries about 35,000 New Jersey commuters to and from Manhattan during the peak periods each day.

"At the opening of these hearings, Commissioner Dwight Palmer, on the basis of his intensive studies of the commuter problem, outlined his transit pro-

gram for the State and his own conclusions and those of his Division of Railroad Transportation with respect to the possibility of the Port Authority's participation in meeting the interstate portion of the problem in the light of both the Authority's financial capacity and the limitations of its credit.

"In his April 1960 report to Governor Meyner and the Legislature, Commissioner Palmer stated that 'The Port of New York Authority should not, in our opinion, be handed New Jersey's rail transportation problem, nor should it become responsible for the New York subway system or for rail transportation for Westchester or Long Island.' At the same time Commissioner Palmer urged that the Port Authority and the Division of Railroad Transportation work out some plan through which the Authority would be able to participate in some aspect of the interstate commuter rail problems, expressing his complete understanding that such Port Authority participation must fully recognize 'the importance of maintaining The Port of New York Authority's commitments and credit requirements.'

"In his statement at the opening of these hearings, Commissioner Palmer reviewed the testimony given before this Senate Commission on September 27, 1960 by our Executive Director who had been authorized by the Commissioners of the Port Authority to review with you the progress on the studies and proposals for possible purchase, reconstruction and operation of the H&M by the Port Authority that have been under consideration by Commissioner Palmer and our staff throughout the past year.

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"Commissioner Palmer pointed out that the revenues and reserves of the Port Authority have been pledged in accordance with the statutes of the two Legislatures and that they cannot legally be diverted to purposes over and beyond those specified in its bond covenants and guarantees.

"We were gratified, however, to be able to advise this Commission last September that, within the framework of these outstanding covenants and guarantees, we have been able to suggest certain legal and financial assurances which, if adopted by the Two States, might make it possible for the Port Authority to acquire, modernize and operate the H&M. We advised you at that time that the Port Authority would go forward immediately with a full-scale study of all aspects of this proposal with the hope that such a study could be completed by the end of 1960.

"My fellow Commissioners have requested me to give you a report on the tentative conclusions of this study. I might say that the study has been undertaken on a top priority basis by the Port Authority staff with the assistance of the consulting engineering firm of Coverdale & Colpitts. One of their partners is here today.

"During the course of the study, our staff consulted with the Division of Railroad Transportation in the New Jersey State Highway Department and its counterpart, the Office of Transportation in the State of New York. We also discussed and reviewed various phases of the study with officials of the Jersey Central, Pennsylvania and Erie-Lackawanna Railroads. We consulted throughout the study with

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officials of the H&M and made numerous and detailed inspections of its entire system.

"Our studies confirm what the Trustee of the H&M has stated about the 'antiquated and inefficient' facilities and the 'worn out' rolling stock and other equipment of his railroad. A large and costly capital improvement program therefore will be necessary to bring the bankrupt H&M to proper standards of efficient and reliable service. The H&M has suffered from the same economic and technological changes in the American transportation system that have adversely affected every other commuter railroad in the country. Despite repeated fare increases, these changes have brought about abandonments, service curtailments, neglect and deterioration of plants and equipment—equipment that has long since been depreciated on the books of the railroad companies and that normally would have been scrapped many years ago.

"It is not surprising, therefore, that the H&M, including the railroad, terminal and real estate properties, valued by the Securities and Exchange Commission less than a year ago at $20,500,000, will require on the basis of our studies, a total capital expenditure of about $63,000,000 for rehabilitation and modernization of the plant and for purchase of new cars. This does not include the cost of acquiring the properties. If this $63,000,000 improvements expenditure is made, we believe that the public will enjoy comfortable, modern and reliable rail transit service across the Hudson River.

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"I would like to outline briefly what the Commissioners of the Port Authority believe can be accomplished for the H&M passengers: (1) if the Legislatures of New Jersey and New York enact the legislation which would make it possible for the Port Authority to finance such a project; (2) if it is possible to acquire at a fair and realistic value the dilapidated properties of the H&M; and (3) if—and this is very important—the Pennsylvania Railroad makes it possible for the Port Authority, as a public agency, to continue to utilize the tracks of the Pennsylvania Railroad under the terms of the present agreement for the joint operations of the two railroads between Jersey City and Newark.

"Without the full cooperation of the Pennsylvania Railroad in agreeing in the public interest to the continued use by the H&M of the tracks of the Pennsylvania Railroad, under their existing agreements with the H&M, these plans for the reconstruction and public operation of the H&M cannot be accomplished. So, too, the project depends upon the ability of the Port Authority to acquire the bankrupt properties of the H&M on fair and realistic terms. Both of these railroad companies have been very active in their efforts to either divest themselves of their commuter operations or to obtain public financial support for their continuance. We trust, therefore, that they will be anxious to cooperate in making it possible for the two States to rehabilitate and continue the H&M services.

"If, then, it becomes possible for the Port Authority to acquire, rehabilitate and operate the H&M, we

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would propose to undertake a major rehabilitation program immediately which could be completed within approximately three years after the time that the Port Authority acquired title to the H&M properties.

"Our studies indicate that approximately $30,000,000 will be necessary to improve the physical plant of the railroad, an additional $24,000,000 to purchase new cars and $9,000,000 to rehabilitate the Hudson Terminal buildings in lower Manhattan, making a total of $63,000,000.

"The railroad's physical plant, as I have noted, over a long period of time has been permitted to deteriorate very badly. I might say that this plant deterioration has reached the point where major interruptions of H&M service occur and may be expected to increase.

"The Port Authority's $30,000,000 program for rehabilitation of the physical plant would include the immediate and necessary replacement of the railroad's obsolete signal system with a modern installation that would permit not only a greater number of trains, but safer and more reliable operation.

"It would provide an entirely new, modern power distribution system which would eliminate the frequent and time-consuming delays now experienced by H&M commuters as a result of power failures.

"It would include major rehabilitation and refurbishing of the H&M passenger stations.

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"The modernization job would also include extensive track maintenance work which would assure a smoother and more pleasant ride.

"Substantial improvements to the present car storage yards and maintenance shops as well as the provision of an entirely new storage yard and maintenance facilities to handle the additional rolling stock would be necessary.

"From time to time, and as recently as last September, the H&M has been forced to close down because of the inability of the inadequate and obsolete drainage system to function properly during serious flooding conditions. This situation would be corrected by the replacement or rehabilitation of all drainage pumps and water discharge lines in the tunnels.

"The Port Authority staff's inspection and study as well as the study and conclusions of our engineering consultants indicate conclusively that H&M's entire fleet of old cars should have been scrapped some time ago. It must be completely replaced. No less than 110 of these cars are over 50 years old and all of this old fleet has been in service for more than 32 years.

"We would purchase 186 of the most modern rapid transit cars available to replace the H&M's antiquated cars. They would be airconditioned, well-lighted, have attractive interior design and afford the best qualities in passenger comfort."

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"In addition to the replacement of this obsolete equipment, 102 new cars would have to be provided for the increased traffic which would be, and we believe could be, handled by the 'new' H&M system. This increase in traffic would result from the consummation of Commissioner Palmer's plan to bring Jersey Central passengers into Pennsylvania Station, Newark, where they would have a direct and convenient transfer across the platform to the H&M. The new H&M cars would also be needed for additional service between Hoboken and lower Manhattan if and when the Erie-Lackawanna ferry service were abandoned.

"Under the existing operating agreements with the H&M, the Pennsylvania Railroad would provide 51 of this total of 288 new cars to handle their share of passenger responsibilities to and from Newark. All of the remaining 237 new cars would be provided by the Port Authority at a cost of about $24,000,000.

"Again, if the Legislatures make it possible for us to finance this H&M project, all of these 288 modern rapid transit cars, with the cooperation of the Pennsylvania Railroad, could be rolling within a three-year period.

"With this $63,000,000 expenditure to rebuild and rehabilitate the Hudson and Manhattan for our generation and for the future, we will have brought into being, in accordance with Commissioner Palmer's plans, a modern and dependable rail connection with Manhattan for the 53,000 daily New Jersey commuters, as compared to the present volume of 35,000

commuters, who would transfer to the H&M from the Jersey Central, Pennsylvania and Erie-Lackawanna Railroads or utilize only the H&M service from Essex and Hudson Counties.

"The costs and other burdens of commuter service on these privately owned railroads will have been substantially reduced as a result of Commissioner Palmer's proposals for service improvements and modifications. These savings to the commuter railroads should in turn reduce the future cost for New Jersey taxpayers of service contracts with the State's principal rail carriers.

"I might note also that practically everything of basic importance that was sought to be accomplished in the plan proposed in 1958 by the Metropolitan Rapid Transit Commission for a five hundred million dollar bi-State transit loop connecting up the principal New Jersey commuter railroads, is met by this proposal for the reconstruction and extension of service on the H&M, and *it can be accomplished without State or municipal subsidy.*

"Travel times for commuters and other riders on the Jersey Central, Pennsylvania and Erie-Lackawanna will be at least as good as, and in many cases better than, those they experience today. In addition, passengers using the modernized H&M will be assured frequent, reliable and comfortable service.

"Insofar as northern New Jersey and particularly the City of Newark are concerned, Commissioner Palmer's plan for bringing Jersey Central passen-

gers into Pennsylvania Station, Newark, will provide a new, direct and fast rail transit connection, never available before, between the residential areas of western Union County, Somerset County and Hunterdon County and the center of Newark. Thus the plan, together with the reconstructed H&M, will make Newark the focal point of a vastly improved and expanded commuter transit service.

"There is, of course, no possibility whatsoever that either the Port Authority or any one else could operate the H&M on a self-supporting basis. The bankrupt H&M has not paid a dividend since 1932; it has not been able to meet the interest on its bonded indebtedness and has been in receivership since 1954. This is not intended to reflect upon the past management of the railroad, since its inability to earn even the interest on its bonded indebtedness is paralleled by many transit systems all over the country.

"On September 26, 1960, the day before our Executive Director advised this Commission that the Port Authority would consider acquisition of the H&M, the market value of the railroad and its properties as appraised by the price of its outstanding securities was a little more than $13,000,000. I might note that the speculative value of these H&M bonds has shown an increase of over 50% in the four months since that announcement, to a total market value of about $20,000,000 today. This speculation obviously has taken place on the basis of our indication that the Port Authority might be willing to pay approximately that sum to acquire the H&M.

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"After this study of the whole situation with all of its variables and contingencies, the Commissioners of the Port Authority are assuming that the acquisition, rehabilitation and operation of the H&M will involve an annual deficit to the Authority of about $5,000,000.

"I should add that this anticipated deficit assumes that every possible effort would be made to maintain the present fare structure.

"With the pooling of Port Authority revenues through our General Reserve Fund (which reflects the policy of the two States with respect to the future development of the public terminal and transportation facilities of the bi-State Port), we are of the opinion that an annual deficit of this magnitude can be carried by our other facilities.

"On this estimate of the H&M losses, and if we are able to satisfy prospective investors by statutory assurances that this proposal will not involve the Authority's General Reserve Fund in any other or further commuter deficit operations, we believe we can conscientiously certify, as we must under our indentures, that this financing will not impair the Port Authority's credit. On the other hand, if we are not in a position to cite such statutory assurances to those from whom we will have to borrow the money, and therefore, we are not in a position to make such a certification, we obviously would not be in a position to borrow money for the acquisition, let alone the improvement, of the H&M. Indeed, any attempt to direct the Port Authority to acquire and

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operate the H&M without such statutory assurances would so damage Port Authority credit as to put it beyond our ability to borrow money for any other Port Authority project.

"I am sure that the members of this Commission appreciate that neither the Commissioners of the Port Authority nor anyone else can divert the existing Port Authority revenues to any new project or facility, or use them, except in strict accordance with the specific provisions of our outstanding contractual agreements with investors. These explicit statutory and contractual controls require that all Port Authority revenues must first be used to meet the operating and maintenance costs of the facilities which produce them. The net operating revenues must then be applied to the principal and interest payments on the specific bonds for which they have been pledged; then all of the remaining balance must be paid into specified reserve funds.

"The monies in these reserve funds are legally available only to fulfill contractual commitments to holders of bonds secured by a pledge of reserves. The General Reserve Fund may not be pledged in support of bonds to finance a new facility under circumstances where the pledge would materially impair the Authority's sound credit standing.

"All Port Authority revenues not applied to operation and maintenance and debt service *must* be paid into one or another of these reserve funds. There are no excess revenues which are free from this contractual commitment to bondholders.

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"The most important pledges that the Port Authority has made to its bondholders are those relating to the issuance of bonds for new projects. These pledges were necessary since otherwise the security could be diluted, not only through the raiding of revenues and reserves, but just as disastrously by the unlimited issuance of bonds which have such revenues and reserves as their primary source of repayment.

"It is because of this that the Port Authority had to covenant with its bondholders not to issue Consolidated Bonds supported by the General Reserve Fund for any new facility unless it can be demonstrated that, including the new facility, net revenues will be sufficient to cover by at least 1.3 times the maximum interest and principal payments due in any future year. Furthermore, bonds for a new facility cannot be issued with a pledge of the General Reserve Fund unless the Port Authority Commissioners certify that the issuance of the new bonds will not materially impair the sound credit standing of the Authority, the investment status of the Authority's bonds, or the ability of the Authority to fulfill its commitments and undertakings. Such protections for investors under open-end revenue bond issues are not uncommon.

"Applied to the H&M proposal, I would like to make it clear that the question of whether or not we can borrow the $83,500,000 which is required, is not simply a question of whether or not we would have to pay a higher rate of interest on these funds. We can only submit to you the unanimous view of the

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Commissioners of the Port Authority that there is no possibility whatsoever of borrowing the money at all without a statutory assurance to investors that any future Port Authority responsibilities in the field of commuter rail transport over and above the present and existing interstate Hudson and Manhattan railroad system will not involve a pledge of the Port Authority's General Reserve Fund.

"I say to you as a New Jersey Commissioner, and with all the sincerity that I can command, that there is nothing arbitrary or doctrinaire about this conclusion. It simply represents the realities of investment financing and the Port Authority's credit. My business is investment financing and I say to you gentlemen that I could not sell a single Port Authority bond without such an assurance. If my responsibility were on the other side of the table, I would not buy a Port Authority bond that did not contain such an assurance.

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"At this point, and on a different phase of the subject, I might say that in our estimates of annual deficits of the H&M, we have included an amount equal to the real estate taxes now being paid on H&M properties in New Jersey and in New York City. We would propose that whatever statute is adopted should contain an authorization to cover this situation. This would be along the lines of the existing statutory provisions which permit the Port Authority to enter into agreements with municipalities to make payment in lieu of real estate taxes on prop-

erties acquired and owned by the Authority. Under the existing statutes these payments may be equal to the sum last paid as real estate taxes upon such property prior to its acquisition by the Port Authority. All of our existing agreements with New York and New Jersey municipalities under these statutes are in that maximum amount.

"We have, of course, kept Governor Meyner's office advised as to the progress of these studies through his liaison officer with the Port Authority, Commissioner Palmer. So too, Governor Rockefeller's office has been kept informed both through his Executive Secretary, Dr. William Ronan; his counsel, Mr. Robert MacCrate, and the Director of the Office of Transportation, Mr. Arne Wiprud.

"If and when the statutory authorization permitting the Port Authority to go forward with this program is adopted by the New Jersey and New York Legislatures and signed by the Governors, we are prepared to initiate negotiations with the reorganized Hudson and Manhattan company looking toward a final determination of the purchase price of the facility.

"Following the adoption of such authorization, we would also undertake formal discussions with the Pennsylvania Railroad for the continuance of existing agreements between the Pennsylvania and H&M on the joint operations of the two rairoads to and from Newark. We assume that the Pennsylvania will be willing to continue these agreements with the Port Authority, a public agency of the two States, on the

same terms and arrangements as they now have with the privately owned H&M.

"In the normal course of events, we would hope that the Port Authority might be able to acquire and commence the operation and rehabilitation program of the H&M before the end of 1961."

By Senator Farley:

"Q. Mr. Kellogg, I notice in the latter part of your statement, you said you must be given assurance by the Legislature that if they directed the Port to proceed to purchase this property, they must make a pledge to the bondholders there be no further projects involving rail. Now I appreciate that if the Legislature directs you to enter into a contract involving the issuance of bonds, there will be no impairment of obligations of contract, but I must call to your attention and the members of your Commission that one Legislature cannot bind a subsequent Legislature involving policy. If, perchance, may I illustrate—ten, fifteen, twenty years from now the respective legislatures of New York and New Jersey importune your Port Authority Commission to do something in addition involving public service, one legislature cannot bind another involving policy. Do you follow me? A. I do.

"Q. I appreciate the legal end of it involving obligation of contract, but in your statement that you be given assurance that no further services should be required of you involving rail forever hereafter—and how this legislature could bind a subsequent leg-

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islature I do not know. A. We'd have to say that to the bondholders, the ones that were going to purchase the new bonds that we as Commissioners believe that this would not endanger the 1.3 ratio.

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BY SENATOR COWGILL:

"Q. I want to clear one thing up. I got a little confused there for a minute on that policy business—in the event that the H and M were acquired on the basis of statutes passed by New Jersey and New York, they would not be called upon, that is, the Port Authority would not be called upon, to go into any further commuter problems of other roads. If bonds were issued under such legislation, you would not be able to issue any further bonds for anything else unless you were willing to certify that it would not— A. That's correct. It wouldn't say that the bonds couldnt be issued with a state guarantee later on for something else or something of that type, freight or anything else.

"Q. It seems to me on that basis, that you enter a contract on the basis of legislation passed, that contract is going to stand and some later legislature is not going to be able to change it. A. That's right.

SENATOR FARLEY:

"My question, Senator, was—and I appreciate we cannot impair obligations: In effect, would any commitment with the present legislature estop or attempt to estop any legislation involving public needs in the future?" [No answer was given at this point].

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7. This point was repeated during a colloquy between Senator Farley and Commissioner Clancy on Jan. 27, 1961:

SENATOR FARLEY:

"I say to you as a commissioner representing New Jersey we too have a responsibility of making sure that this is done throughly, intelligently and in a way that would be feasible and practical. It was testified today by Mr. Kellogg that the Port should not be bound by any other demand from the State Legislature relative to rail service. I pointed out to him—and may I say to you as a lawyer—we well appreciate that any direction we give you by enacting legislation, we could not impair any obligation such as contracts of bond issues. Likewise, you as a lawyer know that one legislature cannot bind the other involving policy five, ten, or twenty years hence.
A. I appreciate that.

"Q. So that when this Committee makes its report, we are not exonerating the Port from any responsibility for any demand for future public service by either the New York or New Jersey legislature. I want you to appreciate that fact.
A. I appreciate that fully and I am aware of the fact if a situation such as that would arise in the future, that would be a matter that we would have to discuss on its own merits with a future Governor and future legislature.

"Q. That's right.

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MR. TOBIN:

"May I say something?

SENATOR FARLEY:

"I want to call you, Mr. Tobin, relative to this situation. If you want to interject something at this time, we will be very happy to have you do so.

MR. TOBIN:

"You might want to know that this legislative assurance, as Commissioner Kellogg pointed out, would only apply to future commuter operations and only limits the use of the pledge of the general reserve fund. It only limits the pledge of the general reserve fund, nothing else. It would not typically bar Port Authority participation where some other scheme of guarantee of the bonds or something like that—

SENATOR FARLEY:

"That would have to depend on its own merit or demerit and then be considered. But I call to your attention as a Commissioner the problem of the Legislature.

MR. CLANCY:

"I am aware of the problem, but, of course, the action that is taken now with reference to the Hudson and Manhattan would not necessarily of itself bar future participation in the problem generally. It would, however, not be possible if that future participation involved any impairment of this reserve fund.

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8. At the [Farley Committee hearings], Austin Tobin, Executive Director of the Port Authority, testified in part as follows: • • •

"Q. Mr. Tobin, if my recollection is correct, speaking of the Hudson and Manhattan proposal—is my recollection correct that you were quoted whether accurately or not in the newspapers in '59 and '60 that the Port of New York Authority should not involve itself in the rail commuter problem and further that it should not undertake a deficit operation? A. Well, Senator, those statements had to do with the proposal that the Port Authority be directed to take over the whole commuter rail transit problem, which from any standpoint that we could envision it was legally and financially and every other way completely impossible. They did not have to do with this new idea developed between Commission Palmer's office and our office that this might be possible if some sort of an assurance—that we might be able to sell what we are talking about, like one hundred million dollars worth of bonds for commuter service if the bond buyers could be given some assurance as to where they were going and what the limits of their involvement were.

"Q. Would you say, Mr. Tobin, that this proposal, as suggested by you at the original meeting of this Committee, is a departure from the original attitude of the Port Authority with respect to the rail commuter problem? A. I think that certainly the idea

of being able to go into the problem to some extent, provided the bondholder on the other side could be given some assurances, certainly is a new concept.

"Q. Would you tell me what prompted the Port Authority to, shall I say, change its attitude in this respect? A. Well, I can't—

"Q. Or perhaps you have already answered that.

A. I think I have, Senator. I can't emphasize how earnestly—I know, I've lived through it through the years. The Port Authority has studied and studied and studied and worked on the possibilities of what it could do or could not do in commuter rapid transit service and has always come up against that concrete wall of the impossibility of selling bonds in the deficit commuter railroad field.

"And you will recall that a couple of years ago we did work out an involvement, if you will, in the commuter rapid transit field in New York under which New York, in the first phase of the program, is advancing $20 million with which we are buying railroad equipment, really as the agent of the State of New York. And then it has a second phase which just was passed in the New York Legislature for the the second time yesterday and will be on the ballot in November by way of a constitutional amendment, under which the State would guarantee the Port Authority a special issue of Port Authority bonds put out for the purchase of rail equipment.

"So, as we have studied this thing through the years we have been able to evolve and develop, which we have been trying to do, new financial schemes

and devices under which it was possible for us to participate and to do what we always wanted to do and to play our part in it.

"Now since certainly in all realism the idea of a guarantee of a special issue of Port Authority bonds in New Jersey is probably quite impossible and since, with the State's financial problems, it would have been hard to think of the State advancing money to the Port Authority to initiate such a program as the State of New York did, here is another financial plan that we have diligently worked out with Commissioner Palmer's help and encouragement, and starting from his initial idea in his report of March 1960 that we simply buy and lease to the Hudson and Manhattan some eight and a half million dollars worth of cars—oddly enough that was impossible—and yet we came to you in September on the basis of conferences and studies that have been going on between the Highway Department and ourselves since February 1960, with a plan which made an $80 million participation possible where an $8½ million participation was not.

"Q. But the Port Authority now is firm in its resolution that it can handle a deficit operation.

A. If we can go to the bondholders with your approval—

"Q. With these restrictions. A.—and say, you don't have to worry beyond this point, because beyond that point they wouldn't worry."

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MR. TOBIN:

"As Commissioner Kellogg testified and Commissioner Palmer testified, we can't get along without these existing rail lines. The problem, as I see it, is to maintain and preserve them and improve them as best we can and stay away from these 'wild blue yonder' $500 and $600 million plans of new transit systems, but the New York-New Jersey area must have the continued service on these existing rail lines and can't do without them. There has been tremendous accommodation of the growth of the population by the buses, but it would just be chaos and impossible today if we tried to transfer the people that come in by rail now on the Jersey Central and the Pennsylvania and the Erie-Lackawanna and, in other areas, the Long Island and the New Haven to buses. It can't be done. It becomes an absolutely essential public service, just as real and essential as streets and water and all of the other necessities of urban life are to us. And we are all in both legislatures and in the public recognizing that this has become a public problem and the programs we have been discussing here for the last two days, both here and the references to them in New York and the references to them on the Federal level, are all recognition that this has become a public problem and people must be able to get back and forth to work. Also, none of us can ask indefinitely private companies to take these staggering losses—and they are staggering."

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9. The Farley Committee record included a letter dated February 10, 1959 from Austin J. Tobin, Executive Director of the Port Authority to the Governors of New York, New Jersey and Connecticut and the Mayor of New York City, which concluded as follows:

"The Port Authority Cannot Undertake Transit Responsibilities

"It has been suggested from time to time that the Port Authority should be the agency charged with financial responsibility for rail transit in the metropolitan area, or at least with its trans-Hudson phase. In their recent Statement to the New Jersey Assembly, the Commissioners of the Port Authority dealt with this subject at length (pages 1 to 11), and submitted in conclusion that:

(1) It is legally, financially and contractually impossible for the Port Authority to assume the railroads' increasingly heavy deficits from all or part of commuter operations, or the cost of developing a new and comprehensive interstate rail rapid transit system; and that

(2) Even if it were legally and contractually possible, very quickly the assumption of rail transit deficits by the Port Authority, the self-supporting agency of the two States, would cripple and destroy the Authority's credit. It would thereby bring to a halt the program now being carried out by the Port Authority on behalf of the two States for the continued development of their essential pub-

lic marine and inland terminal facilities, airports and interstate arterial systems.

"Within the framework adopted by the two States in the Port Treaty of 1921, the Port Authority has developed a system of essential public transportation and terminal facilities in the bi-state New York-New Jersey Port District. The projects which make up this system have all been planned, constructed and operated within the completely self-supporting requirement of the two States, and without recourse to any funds derived from the taxing power or the credit of either State or any of its political subdivisions.

"Under this program six interstate bridges and tunnels between New York and New Jersey, the four major metropolitan airports and a heliport, four inland terminals (for buses, truck and railroad freight) and a $125 million system of modern docks and piers on both the New York and New Jersey sides of the harbor have all been provided and function as essential elements in the public transportation and terminal system of the region.

"Under present contractual commitments, the Port Authority will, during the next five years, build other essential facilities and additions to existing facilities including the second level of the George Washington Bridge and the Washington Heights Bus Passenger Facility, the Narrows Bridge, the Brooklyn-Port Authority Piers, the Elizabeth-Port Authority Piers, the completion of New York International Airport, and the complete modernization of

LaGuardia Airport. This program, which will require the Authority to borrow over $700 million of capital funds in the next five years, is based on express authorizations of the Legislatures and Governors of both New York and New Jersey. All these projects and facilities, like the facilities already in operation, will be self-supporting and can be financed only on such a basis. It has been overwhelmingly demonstrated that rail transit is not and can never be in this category.

"The Port Authority has, therefore, been obliged to state unequivocally that it cannot assume any financial responsibility for rail passenger transportation in the Port District. We have also noted that, even if it were legally and contractually possible, the assumption of the large and ever-increasing deficits of rail commutation would quickly destroy the Port Authority's credit and bring to a halt the entire present and future program of port and regional development which it is carrying forward on behalf of the two States. It is an ironic fact that the assumption of rail passenger deficits would not only destroy the Authority's vital programs of self-supporting transportation and terminal facilities, but would also destroy the Port Authority's ability to finance rail transit itself.

"Port Authority Assistance in Solving the Problem

"Even though it is thus impossible for the Port Authority to participate financially in any degree to the solution of the rail commutation problem, the Authority, for many years, has assisted in the study

of the problem and in the search for a solution. We stand ready today, as always, to assist in any way possible in the search for solutions to the mass transit problem in either its trans-Hudson aspect or in its over-all relation to the region as a whole."

10. In testimony before the Farley Committee on May 5, 1961 Mr. Tobin testified:

"SENATOR FARLEY: What is your plan involving the Hudson and Manhattan?

"MR. TOBIN: In the general plan that has been discussed with the legislatures and is the subject of discussion with both legislatures now, the Port Authority would propose to purchase the Hudson and Manhattan and to completely reconstruct and rehabilitate it. It would cost in excess, we estimate, of $80,000,000 to $85,000,000 to do that. It would require some 280 new cars. The plans are closely integrated with those of Commissioner Palmer for the general New Jersey commuter program. It requires a completely new signalling system and the construction also of certain new car facilities. We would plan in connection with it to pay full taxes now being paid in both states on the Hudson and Manhattan properties. We would take over as part of it the Hudson Terminal Buildings, not so much for their revenue aspects because even after you reconstruct them, they wouldn't appear to do much more than break even. But that banjo terminal of the Hudson and Manhattan is constructed inside those terminal buildings and their electrical power sub-stations, some of them, are in there and it's really

a simpler operation to take over the buildings than to try to separate the pepper and the salt as between who owns the first floor and the second floor and work that all out.

"This would require identical legislation in both states which, of course, is under active discussion. It would also require—we have advised the legislatures—some form of limitation to bondholders. In other words, nobody in their right mind would buy a Port Authority bond at the time that the Port Authority is going into the commuter rapid transit system with set and established losses that outside of the city subway system today amount to about $30,000,000 a year. Now nobody is going to buy that kind of an open-end revenue bond. But we believe that we can peddle a Port Authority commuter railroad bond if you permit us to go to the fellows who buy the bonds and say 'We are going to do this job and we can't argue with you the job won't lose money, but the Legislature has assured you that we won't go in it beyond some point, which under the discussions about the bill which was introduced in the Assembly in New Jersey was that the Legislature would agree with our bondholders that it's an odd way to express financing, but that we wouldn't commit ourselves to projects that we thought would lose in total more than 10 per cent of the general reserve fund.' Now the general reserve fund is $70,000,000 and it should be in about two or three years at about $100,000,000. It has to be 10 per cent of the outstanding bonds and there are close to $700,000,000 bonds outstanding now and there will be

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$1,000,000,000 in Port bonds outstanding in a couple of years. So 10 per cent would be $10,000,000. In other words, we would be able to say to the vice president of a trust company about to buy a Port Authority bond, 'Don't be afraid of this. It is a losing project, but the Legislature assures you that they won't ask us to go in it beyond a point where we are losing more than'—if there's $100,000,000 in bonds out—'$10,000,000.'

"Now, on the Hudson and Manhattan, I estimate we will lose $5,000,000 a year.

"SENATOR FARLEY: . . . Under the general bonding procedures that you follow, why do you make the point that it would be difficult to sell bonds by having to tell the purchasers that this would be a loss operation when you have been able to sell bonds before for loss operations and when you sell them as a general bond and not as a specific bond for the H & M?

"MR. TOBIN: Well, we have never gone into any field before where we couldn't look a bondholder in the face and say, 'W honestly believe that we can make this self-supporting and that you'll get your money back.' We have been wrong. In the case of the motor truck terminals, certainly we were wrong. And those terminals by themselves have not earned enough and without the pooling of the general reserves wouldn't be enough. But here is a point where you enter a field where no one seriously argues that you can do anything with commuter rapid transit with its 20 hour a week service but lose money and lose money big.

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"They know also that the commuter railroads around New York and New Jersey now are losing currently $30,000,000 a year and those are pretty nearly correct figures—they are not ICC formula figures. Now, as you move into that field, the whole market can panic on you and you are selling in a highly competitive securities market where the trust officer for the bank—all of this money in these large amounts are in charge of fellows carrying the responsibility of investing other people's money—he doesn't have to buy this morning a Port Authority bond; he has three or four bonds put in front of him that are of equal or better rating and that are just as fine a yield and in just the same general category if he is diversifying his portfolio. Senator, he isn't going to bother arguing with me as to whether or not we will be able to pull through in this field of commuter transit deficits—he isn't going to be able to argue with me that he needn't worry that in the future the legislatures would never ask the Port Authority to take on any more commuter deficits. In this competitive field, he isn't going to bother—he doesn't have to bother. And that's the reality of the situation.

"I know and I have reason to believe that some of the Senators sitting here know of a very large investor of Port Authority bonds who has already put them on the market because of this type of discussion and it's not an isolated case. So the credit situation that we face as we move into this new deficit field in which the City of New York typically on its subways loses $125,000,000 a year alone—as

we move in, no one is going to lend you money for 30 years without some statutory assurance of just how far we're going."

11. The following is an excerpt from the report dated June 28, 1963 of the Farley Committee:

"Peat, Marwick, Mitchell & Co., the accounting firm which made the audit of the records of the Port of New York Authority for the Committee, has submitted to the Committee its written report together with supplemental oral information.

"The basic framework and philosophy of the Port Authority with respect to its financing policies and its adherence to the principle of administering self-supporting facilities are soundly conceived. For example, the auditors reminded us that the General Reserve Fund and the pooling of revenues are the means selected by the States' Legislatures to enable the Authority:

'To finance its operations as a single enterprise rather than having to finance each of its facilities separately relying solely on the merits of that facility alone. The general reserve makes it possible for the Authority to finance new facilities which otherwise could not be financed without resorting to either state or other outside assistance in the form of advances, subsidies, guarantees or the like.'

"And after reviewing the Authority's financial structure the auditors concluded 'that few of its facilities would have been financially feasible without the ability to pool revenues of all facilities.'

"The auditors also stress that the single enterprise financial structure of the Authority has an important bearing on the Authority's accounting procedures. The auditors report that:

'The Authority's financial structure is based on a single enterprise, pooling of revenues concept. Individual facilities are not financed independent of the rest of the Authority. The facilities contribute their revenues for debt service according to their earning power without regard to the amount of bonds which were issued for their construction. For these reasons any presentation of net revenues after debt service for individual facilities is not based on actual fact. As pointed out by the Authority in submitting its report, such a presentation can only be based on arbitrary assumptions.'

"COMMUTER RAPID TRANSIT

"On September 27, 1960, at the first public hearing of this Committee, pursuant to Resolution No. 7, The Port of New York Authority announced that it would undertake an immediate study of the feasibility of that agency acquiring, modernizing and operating the Hudson and Manhattan Railroad. This was the first public expression by the Port Authority of its willingness to share in the responsibility of meeting the commuter rapid transit requirements in the area of northern New Jersey.

"At the September 27 hearing, the Port Authority suggested that:

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'The Port Authority might be able to sell bonds for the acquisition and modernization of the Hudson & Manhattan Railroad and continue the financing of the States' vital port development program:

'(a) if investors could be given contractual assurance, with statutory protection, that the Port Authority's responsibilities in the field of commuter rail transit would be confined to the present and existing interstate Hudson & Manhattan Railroad systems;

'(b) if all the Hudson & Manhattan Railroad system, including the Hudson Terminal properties could be acquired on the basis of their present realistic market values;

'(c) if the operating agreements between the Hudson & Manhattan and the Pennsylvania Railroad could be transferred to the Port Authority on reasonable financial terms, permitting the continued use by Hudson & Manhattan trains of the Pennsylvania Railroad's tracks, stations and other facilities between Jersey City and Newark;

'(d) if Commisioner Palmer's recommendation of linking the Jersey Central Railroad via the Lehigh Valley tracks with the mainline of the Pennsylvania Railroad would be carried out, thus making it possible for Jersey Central commuters to transfer at Newark, either to the Hudson & Manhattan service to downtown

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Manhattan or the Pennsylvania's uptown service to Penn Station in New York; Commissioner Palmer's plan also envisaged the eventual handling by the Hudson & Manhattan of all interstate commuters from the Erie and Lackawanna Railroads now coming into the rail terminal at Hoboken, many of whom presently use the railroad ferry to Manhattan.'

"In concluding his statement on the prospects of acquiring the Hudson & Manhattan Railroad the Executive Director of the Port Authority, Mr. Austin J. Tobin stated that:

'The Commissioners have asked me to assure you, Mr. Chairman and the members of this Committee, that the Port Authority will continue to pursue this matter to the end that we may make a report and recommendations to the Governors and to the Legislatures of New Jersey and New York. It is our hope that this may be possible before the end of this year.'

"The Port Authority's study of the Hudson and Manhattan Railroad was concluded in January, 1961. The results of that study and the Port Authority's announcement that it would be able to go forward with the Hudson & Manhattan project with appropriate authorizations were made public by this Committee's public hearing in Newark on January 27, 1961. At that hearing, James C. Kellogg, III, Vice Chairman of the Port Authority testified as to the Authority's ability to go forward with the acquisition and rehabilitation of the Hudson & Manhattan.

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"Vice-Chairman Kellogg and Mr. Tobin were questioned at length by members of this Committee on all aspects of its proposed program to acquire the bankrupt railroad. In addition the Committee heard testimony on this date and the preceding day from commuter groups, railroad representatives, individuals and civic associations on various aspects of the prospective transit responsibility of the Port Authority. These hearings, which were devoted exclusively to the subject of commuter rapid transit, resulted in a conviction on the part of this Committee that the Port Authority's proposed program to acquire and improve the Hudson & Manhattan equipment and facilities was sound and in the best interests of the people of this State.

"During 1961, the New York State Legislature enacted legislation which empowered the Port Authority to proceed with the acquisition, modernization and operation of the Hudson & Manhattan Railroad and coupled in the same bill an authorization for the Authority to undertake the development of a World Trade Center on the east side of lower Manhattan. The bill contained no statutory covenant to protect Port Authority credit against future transit responsibilities which would divert its railroad deficits to revenues and reserves pledged to its bondholders. This legislation proved unacceptable to New Jersey because of the manner in which these two projects were 'packaged' in one statute and because the absence of such a statutory covenant, in our judgment, endangered the future utility of the Port Authority to the 2 States. Accordingly, an

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impasse developed in 1961 between the States of New York and New Jersey on the appropriate form of legislation for these two projects.

"This Committee was convinced that the credit problem which had been pointed out by the Port of New York Authority was a valid and real one and that the Port Authority could not assume responsibility for the complete burden of the deficit-ridden commuter railroad problem in the area of northern New Jersey and New York. If the Port Authority were to receive such unrestricted responsibility, there is no question but that its sound credit position would be seriously impaired, if not destroyed, and it would become impossible for the Authority to continue to move forward either with such a rail program or with other vital transportation and terminal facilities and other facilities of commerce desired by the 2 States in continuing the Port Authority's tradition as a public agency.

"As a result of lengthy discussions and firm insistence by the New Jersey Division of Railroad Transportation that Port Authority operation of the Hudson & Manhattan Railroad must extend beyond the main stem, which was concurred in by New York State conferences, the following program was adopted as acceptable to the States of New York and New Jersey:

1. Extending the Port Authority's authorization beyond the present Hudson & Manhattan Railroad system;

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2. Limiting the authorization at this time to extensions of that system within a delineated area to permit over-the-platform transfer of passengers between the Hudson & Manhattan Railroad and the major passenger railroads operating in New Jersey;

3. Limiting by a constitutionally-protected statutory covenant with Port Authority bondholders the extent to which the Port Authority revenues and reserves pledged to such bondholders can in the future be applied to the deficits of possible future Port Authority passenger railroad facilities beyond the original Hudson & Manhattan Railroad system;

4. Measuring that limit by 10% of the amounts of the Port Authority's General Reserve Fund at the time (or 1% of its equity, if larger, in that Fund and in its bridges and tunnels and other facilities owned and operated by it) so that a new deficit ridden passenger railroad facility can be added to the Port Authority's General Reserve Fund family of facilities (and thus be able to syphon off the pledged revenues of the self-supporting facilities and the pledged reserves accumulated therefrom) only if the estimated annual deficit of all Port Authority passenger railroad facilities, including the proposed new one, do not exceed the limiting figure at the time; and

5. Permitting enlargement beyond the limiting figure only to the extent of state guarantees of

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Port Authority deficit from passenger railroad facilities.

"Late in 1961, a proposal was made to shift the location of the proposed World Trade Center to the west side of Manhattan and to integrate it physically with and directly above the lower Manhattan terminal of the Hudson & Manhattan Railroad. This program had appeal for the State of New Jersey and, in effect, meant that the Port Authority's improvement of the Hudson & Manhattan system, including its extensions, and the World Trade Center were, in fact, one integrated project. By this time, general agreement among the officials of both the States of New York and New Jersey had also been reached on the extent of the use of the Port Authority's revenues and reserves in meeting transit deficits. Thus, the way had generally been cleared for prompt legislative action by both States authorizing the Port Authority to proceed as rapidly as practicable with the single project—the World Trade Center and the Hudson Tubes and its extensions.

"It was with a great deal of satisfaction that the full membership of this Committee sponsored the legislation authorizing the Port Authority to proceed with this project, one of the most important statutes ever to be enacted by the New Jersey State Legislature. On February 13, 1962, both Houses of the Legislature passed this bill by unanimous votes (with one abstention in each House) and Governor Hughes signed the Bill on the same day.

Soon thereafter New York enacted the same Legislation.

"By virtue of its thorough investigation of all aspects of the Port Authority's operations, and its work with the Port Authority and with the public officials of both States this Committee was enabled to evaluate and to participate in bringing about a Port Development project which, in our opinion, will be of inestimable value to the citizens of the State of New Jersey and the Metropolitan area.

"Our Committee has been impressed with the performance and untiring efforts of the Port Authority Commissioners both of New Jersey and New York toward insuring the maintenance and growth of our great Port. The efficiency of the Executive Director, Austin J. Tobin, and members of his staff has made possible our thorough, frank and productive research of an Agency which in its record of performance is excellent.

"CONCLUSIONS

"The Committee has discharged its assignment under Senate Resolution No. 7. In connection with the first branch of that resolution, we have studied the entire financial structure and operations of the Port Authority, including the receipts and disbursements of its funds. We find the structure appropriate to the assignments which the State Legislatures have made to the Port Authority and soundly devised to achieve the lowest possible cost for borrowed money. We are conscious that the Port

Authority, having no taxing power, can operate only by continuing the cycle of borrowing money to provide facilities which yield revenues which repay the borrowings and establish the reserves to permit additional borrowings. We are mindful that in the original Compact of 1921 the 2 States recited that the cooperation of the States was required 'in the encouragement of the investment of capital.' The Authority has in our judgment balanced the public necessities against the needs to attract private capital which can only be attracted by a sound credit and confidence in efficient management.

"In studying the receipts and disbursements of funds we were led to consider the entire internal organization of the Port Authority and its control to achieve efficiency and economy. We retained outside professional auditors to make a complete and disinterested audit of the Port Authority. On the basis of their report we have concluded that the Port Authority employs good business techniques and follows sound and prudent management polices and practices to the end that the public is best served, and that the policies employed by the Port Authority operate to minimize its construction and operating costs, to develop fully its revenues other than bridge and tunnel tolls and to avoid favoritism in any of its business transactions. The internal policies of the Authority are soundly conceived, clearly contained in written instructions and complied with by the Port Authority staff. The auditors studied the particular sensitive areas of purchasing contracts and concession letting, the rental

of space, the procurement of insurance, the acquisition of real property and related fields. On the basis of their report we are satisfied that the Port Authority's techniques are soundly conceived and efficiently followed.

"Initially we assumed that it was possible to achieve detailed reporting of net operating results facility by facility not only after operating expenses but after debt service as well. The auditors' report has explained why this is not possible without arbitrary assumptions. We therefore conclude that the Port Authority has performed its duty to report properly on the financial results of its operations when it combines the debt service of facilities which have been soundly combined for financing purposes. We have considered the question of the size of the Port Authority from the point of view of its assets and revenues. We find that the size of the Port Authority is commensurate with its responsibilities vested by the Legislatures and with the growth and progress of the Northern New Jersey—New York metropolitan area which it serves.

"Also with regard to the first branch of the Senate Resolution No. 7, the Commission has studied the use and distribution of the surplus revenues of the Port Authority to determine how they may best 'inure to the benefit of the citizens of this State.' We conclude that the best use of such surplus revenues is to provide the credit base which will permit the financing and effectuation of such additional facilities as the two State Legislatures wish from time to time to achieve without taxation and through

the instrumentality of the Port Authority. The General Reserve Fund Statutes of 1931 established that policy and unquestionably the policies should be continued. The concept of the Port Authority articulated by the Investigating Committee of 1940 reflected that approach and that legislative judgment was vindicated by the record of growth and achievement of the Port Authority over the past two decades. We are in accord with these findings.

"With regard to the third branch of our authorizing resolution, we have studied the responsibility and accountability of the Port Authority to the Legislature of this State and to its citizens. We have established that the Port Authority is accountable to this Legislature and that accountability was evidenced by the complete responsiveness of the Port Authority to all of the requirements of this Committee in pursuing its investigation. It is recommended, however, that the Port Authority furnish to the Legislatures the Minutes reflecting their activities at the same time they are furnished to the Governors of the respective States.

"As required in the Compact, the Port Authority annually submits a report to the Legislatures setting forth in detail the operations and transactions conducted by it. Upon receipt of this report we urge that the Legislature, through its regularly established committees, annually invite officials of the Authority to appear before them to answer questions and to provide any further information on the operations and activities of the Authority. We believe such a regular and personal report and examination would expedite the work of the Legislature, and also would provide the public with useful

information regarding the Authority and would emphasize the continuous responsibility and accountability of the Port Authority to the respective Legislatures.

"With regard to the responsibility and accountability of the Port Authority to the citizens of New Jersey, it is clear that this responsibility and accountability must continue to be through the Governors and Legislatures of the two States.

"The Port Authority has attempted to keep the Governors advised as to such of its proposals as it deems controversial before they are adopted so as to obtain the benefit of the thinking of the respective Governors' viewpoints and avoid the necessity of veto and modification to meet the Governors' objections. The veto of the Governor continues as a most effective instrument for assuring that the policy of the Port Authority cannot depart from the policy of either State. We observe that the Governors have not hesitated to use the veto power when they deemed it appropriate.

"With regard to the final item of the third branch of our authorizing resolution, we have investigated whether or not the Port Authority is fulfilling its statutory duties and obligations. We have concluded that the Port Authority has not exceeded the powers vested in it by the two States and that it has met all of its obligations and fulfilled its statutory duties. The sole exception was the commencement of the Third Tube of the Lincoln Tunnel under existing authorization to construct the facility. The Legislature subsequently amended the statutes to bring this project within the Authority's statutory duties. It

will be remembered that the initial compact and even the comprehensive plan of 1922 were mere charters of ultimate goals. The Legislatures have directed the Port Authority's course by specific statutes from year to year. By granting and withholding particular authorizations they have set the limits within which the Port has operated.

"Over the years the Port Authority has developed and grown into a full-fledged economic entity of proportion and maturity in the fulfillment of programs designed for the progress and development of the States which authored its existence. While the Authority is a great contributor to progress, and development of the States which authored its existence, at the same time it serves as a barometer portending trends and marking goals for the future. We feel that the Port Authority has been a constructive influence in the economic life of the State and so long as it maintains its traditions and standards of public service, and at the same time continues to manifest a sensitivity and responsiveness to public need and progress, it should be given official encouragement and support in its endeavors.

Respectively submitted,

By:

FRANK S. FARLEY, Chairman
WAYNE DUMONT, JR.
WILLIAM E. OZZARD
RICHARD R. STOUT
JOSEPH W. COWGILL
JOHN A. LYNCH
WILLIAM F. KELLY, JR.
DONAL C. FOX"

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12. The following is an excerpt from the 1960 Annual Report of the Port Authority:

"Hudson & Manhattan Railroad

"In September 1960, the Port Authority outlined a proposal for financing the purchase, modernization, and operation of the Hudson & Manhattan Railroad. This development was the result of a series of meetings and discussions between Dwight R. G. Palmer, New Jersey State Highway Commissioner, and the Port Authority, starting in February 1960, which sought to find a means by which the Authority could assist in the solution of the trans-Hudson rail transit problem and still carry out the essential self-supporting port development program authorized by the two States.

"The Hudson & Manhattan, which provides an essential trans-Hudson commuter service for 31 million passengers a year, began operations in 1908. It provides services between Newark, Jersey City and Hoboken in New Jersey and New York City through two branches—one to the Hudson Terminal in downtown Manhattan and the other uptown to 33rd Street and Sixth Avenue. The H&M has been in bankruptcy since 1954. Under the proposed plan of reorganization of the company which is expected to be put into effect in 1961, the railroad and real estate activities would be separated. It is doubtful whether, under this plan, the railroad could remain in operation for more than two years.

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"Port Authority Study Conducted

"Following the September announcement, the Port Authority initiated a comprehensive study to analyze all aspects of possible Port Authority acquisition, modernization and operation of the Hudson & Manhattan.

"The study was devoted to a thorough analysis of the plant and equipment presently in service, including the need for complete rehabilitation of stations, tracks, and the railroad's signal and power systems. The study revealed that such a rehabilitation for the railroad alone would cost about $30,000,000. Similar study of the need to rehabilitate and modernize the Hudson Terminal Buildings in lower Manhattan indicated that capital improvements of about $9,000,000 would be required.

"The study also revealed that all of the old fleet of H&M cars, from 32 to 52 years old, should be replaced. A total of 288 modern and air-conditioned cars would have to be purchased as replacements and to provide for the anticipated additional service required under Commissioner Palmer's plans for consolidating and re-routing of certain New Jersey commuter rail services. This would add another $24,000,000 to the rehabilitation cost of the Hudson & Manhattan.

"The capital requirements for complete rehabilitation, therefore, would amount to approximately $63,000,000, not including the cost of purchasing all of the Hudson & Manhattan properties. The Port Authority pointed out to a New Jersey Senate Com-

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mission that in the bankruptcy proceedings of the Hudson & Manhattan Railroad Company the court had approved an SEC finding that the price which might be realized upon a sale to a private corporation of H&M properties, including the Hudson Terminal Buildings, would not be more than $20,500,000. Thus, the total capital cost of such an acquisition and modernization program should approximate $83,500,000 and would assure safe, comfortable, reliable trans-Hudson commuter service for our generation and the future.

"DEFICIT OPERATION

"Our studies concluded that there is no possibility that either the Port Authority or any other organization could operate the H&M on a self-supporting basis. After taking into consideration all of the variables and contingencies, our studies indicated that the acquisition, rehabilitation, and operation of the H&M by the Port Authority would involve an estimated annual deficit to the Authority of about $5,000,000—with every effort being made to maintain the present fare structure.

"STATEMENT OF THE VICE-CHAIRMAN

"Upon completion of the study, Port Authority Vice-Chairman James C. Kellogg, III, in a statement on January 27, 1961 before a New Jersey Senate Commission, presented for the consideration of the Commission and the Governors and Legislatures of New Jersey and New York, the findings of the study together with the view of the Commissioners of the

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Port Authority on the type of authorization by the two States which would permit the Port Authority to finance the acquisition, modernization, and operation of the Hudson & Manhattan Railroad.*

"In this regard, Commissioner Kellogg stated:

'With the pooling of Port Authority revenues through our General Reserve Fund (which reflects the policy of the two States with respect to the future development of the public terminal and transportation facilities of the bi-State Port), we are of the opinion that an annual deficit of this magnitude ($5,000,000) can be carried by our other facilities.

'On this estimate of the H&M's losses, and if we are able to satisfy prospective investors by statutory assurances that this proposal will not involve the Authority's General Reserve Fund in any other or further commuter deficit operations,** we believe we can conscientiously certify, as

"*The Port Authority has no present effective legislative power would would enable it to undertake the financing and effectuation of such a facility. As a bi-State agency, the Port Authority is able to proceed with undertakings only when they have been authorized under concurrent legislation passed by both the States of New Jersey and New York."

"**The State of New York on April 6, 1961, enacted legislation sponsored by Governor Rockefeller on the subject of Port Authority acquisition, improvement and operation of the Hudson Tubes and related properties and of the effectuation by the Port Authority of a World Trade Center. The New York legislation was in the form of a single act authorizing the Port Authority to effectuate these two facilities which the act describes as 'combined port development facilities' upon the terms and conditions set forth therein. This act contains no covenant with, or assurance to, Port Authority bond-

we must under our indentures, that this financing will not impair the Port Authority's credit . . .'

"The Vice-Chairman went on to testify that the Commissioners of the Port Authority might, therefore, be able to sell bonds for the acquisition and modernization of the Hudson & Manhattan Railroad and to continue the financing of the two States' vital port development program: (1) if the Legislatures of New Jersey and New York enact the legislation which would make it possible for the Port Authority to finance such a project; (2) if it is possible to acquire at a fair and realistic value the dilapidated properties of the H&M; and (3) if the Pennsylvania Railroad makes it possible for the Port Authority, as a public agency, to continue to utilize the tracks of the Pennsylvania Railroad under the terms of the present agreement for the joint operations of the two railroads between Jersey City and Newark.

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holders on the subject of future Port Authority responsibilities in the field of commuter rail transit.

"In the State of New Jersey Assembly No. 519, sponsored by the Governor, would authorize the Port Authority to acquire, improve and operate the Hudson & Manhattan Tubes and related properties, and contains a proposed covenant by the two States and with certain Port Authority bondholders purporting to limit the application of pledged Port Authority revenues and reserves for commuter railroad purposes to purposes in connection with the Hudson Tubes. This bill would permit the application of such pledged Port Authority revenues and reserves in the future for any other commuter railroad as to which certain certifications would have first been made by the Port Authority.

"In the opinion of Port Authority General Counsel and Bond Counsel, the New York act will not become effective upon the enactment of New Jersey Assembly Bill A-519 and if New Jersey Assembly Bill A-519 is enacted, such bill will not become effective without further New York legislation of like effect."

"Throughout the Hudson & Manhattan study the Port Authority worked closely with Commissioner Dwight R. G. Palmer in his capacity as head of the Division of Railroad Transportation of New Jersey. The Governor's Office in New York State and the Director of the New York State Office of Transportation, Mr. Arne C. Wiprud, were consulted as the study and proposal moved forward. In his statement before a New Jersey Senate Commission, Commissioner Palmer endorsed the findings of our study, stating that 'from my personal point of view, acquisition of the H&M is a must. All our plans hinge on it.' In addition, the New York-New Jersey Transportation Agency, of which Commissioner Palmer and Mr. Wiprud are the two official members, recommended to the Governors of New York and New Jersey that their States take immediate action to authorize the Port Authority to acquire, modernize and operate the Hudson & Manhattan Railroad. They termed this proposal 'the key to any plan for the solution of the trans-Hudson commuter problem.'" (Stip. 171-195)

13. The following is an excerpt from the 1961 Annual Report of the Port Authority:

• • •

"FINANCIAL ASSURANCES

"The proposal to assume responsibility for Hudson Tubes deficits constituted a marked departure from the policy of the two States to authorize the Port Authority to undertake only such facilities as were capable of eventual self-support. The inevitable deficits from the Hudson Tubes facility can be

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met only from the pooled revenues and reserves derived from the self-supporting facilities of the Port Authority. These revenues and reserves have all been pledged to the holders of outstanding bonds the proceeds of which have financed the public facilities now operated by the Port Authority.

"The undertaking of any additional public facilities by the Port Authority requires the ability to pledge these revenues and reserves for the new bonds which may be issued to effectuate such additional facilities. The Port Authority could not propose to dilute these revenues and reserves by the Hudson Tubes deficits and preserve its credit unless bondholders, present and prospective, could be assured that the dilution would be maintained within manageable proportions.

"After careful consideration the Board was of the opinion that the deficits anticipated for the basic Hudson Tubes system would be within the limits which prospective investors would accept without a downward revaluation of the Port Authority's credit. On the other hand the possibility of unlimited Port Authority responsibility for all Port District commuter railroad deficits far exceeded such limits.

"During 1961 various proposals were discussed with representatives of the two Governors and the legislative leaders of the two States and the Port Authority to agree on minimum financial assurances which might be included in any authorizing legislation so as to preserve the Port Authority's ability, with unimpaired credit, to continue to discharge its responsibilities to the people of the two States.

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"As the year ended, agreement was crystallizing on a formula which would limit the ability of the Port Authority to pledge or apply any of its revenues or reserves already pledged to bondholders for new bonds to finance an additional railroad facility beyond the basic Hudson Tubes system, unless the additional facility could be certified by the Port Authority Commissioners to be self-supporting or else to involve permitted deficits within certain specified limits. Generally, the limit was an amount which, when added to the deficits on prior Port Authority passenger railroad facilities including the Hudson Tubes, would produce a total not exceeding 10 per cent of the amount in the General Reserve Fund with certain adjustments. Agreement was crystallizing also that such financial assurances would take the form of a bi-state statutory covenant which would not be subject to impairment by either the Port Authority or the States.

"With agreement approaching at the end of the year on the form and content of the financial assurances, the site of the World Trade Center, and the extent of authorized Hudson Tubes extensions, there was a good prospect for early bi-state agreement on the necessary legislation to effectuate the unified World Trade Center-Hudson Tubes project.*"

"* On February 13, 1962, the New Jersey Legislature unanimously passed, and Governor Hughes signed, legislation authorizing the Port Authority, upon concurrence by New York, to go forward with the combined Hudson Tubes-World Trade Center project. This statute included covenants with bondholders along the lines described in the text. Identical legislation was finally adopted by the New York Legislature on March 7, 1962. It will require Governor Rockefeller's signature to become law."

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14. In early 1962, New York and New Jersey enacted legislation authorizing the Port Authority to construct the World Trade Center near the Hudson River and to take over the Hudson & Manhattan Railroad "as a unified project" on the basis of detailed legislative findings of the needs for this project. See N.J.S.A. §§ 32:1-35.50 *et seq.* As part of this statute (N.J.S.A. §§ 32:1-35.55), the two States enacted the following provision:

> "The 2 States covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, (a) the 2 States will not diminish or impair the power of the port authority (or any subsidiary corporation incorporated for any of the purposes of this act) to establish, levy and collect rentals, tolls, fares, fees or other charges in connection with any facility constituting a portion of the port development project or any other facility owned or operated by the port authority of which the revenues have been or shall be pledged in whole or in part as security for such bonds (directly or indirectly, or through the medium of the general reserve fund or otherwise), or to determine the quantity, quality, frequency or nature of the service provided in connection with each such facility; and (b) neither the States nor the Port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged

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> in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth."

15. Governor Rockefeller's statement issued in connection with this legislation provided in part:

> "March 27, 1962
>
> "The enactment of this measure concludes an agreement between the States of New York and New Jersey which is of first-rank importance to the economic well-being and development of the New York-New Jersey metropolitan region and to the continued vitality of this region as a major center of job opportunities.
>
> "Under this legislation, which is in the form of a single bill, the Port of New York Authority is authorized to undertake a unified port development project, which will include the establishment and construction of a World Trade Center on the lower west side of Manhattan, the acquisition and rehabilitation of the Hudson Tubes, and extensions and improvements of the Hudson Tubes service.
>
> "Both components of the unified port development project are aimed at one goal, the continued economic vitality and prosperity of the bi-state metropolitan region.
>
> • • •
>
> "The salvaging of the Hudson & Manhattan Railroad and the extension and improvement of its service is of vital importance of the commuters of both States.

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• • •

"The need for this measure is apparent:

• • •

"Hudson Tubes

"Adequate commuter rail transportation is essential to prevent the economic strangulation of metropolitan New York.

"This State has a vital economic stake in the maintenance and improvement of rail commuter service between New Jersey and Manhattan.

"The Hudson and Manhattan Railroad has been, over the years, an unsuccessful operation. It has not offered the effective trans-Hudson commuter rail service that is so urgently needed.

"Under this bill the Port Authority will take over the Hudson Tubes and do the kind of job that is called for.

• • •

"This single bill unifies both components of the port development project physically by relocating the World Trade Center complex, previously planned on the east side of lower Manhattan, to an area on the west side encompassing the present H & M Railroad Terminal. The existing terminal buildings will be removed. The tracks will be realigned to increase allowable train speeds, platforms will be expanded to increase train capacities, lobby and concourse facilities will be reconstructed and new, modern terminal facilities will be provided.

• • •

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"To preserve the Port Authority's credit strength the bill includes a covenant by the two States that additional deficit financing of future railroad projects will only be undertaken within the financial limits set forth in their covenant.

"The bill authorizes the City of New York and the Port Authority to agree on the use of urban renewal powers in the effectuation of the project and provides for agreements by the Port Authority with the municipalities concerned to hold the municipalities harmless from loss of taxes on property acquired for the project.

"I take great pleasure in approving this legislation which completes the authorization for The Port of New York Authority to proceed with this great public program. It represents the bringing of many resources to bear in solving most serious problems peculiar to the great bi-state metropolitan area.

"The bill is approved.

Nelson A. Rockefeller"

16. "Affected bonds" were defined by the 1962 statute to include all bonds secured in whole or in part by the General Reserve Fund of the Port Authority. All Port Authority Consolidated Bonds issued since 1952 have been secured by the General Reserve Fund under the terms of the Consolidated Bond Resolution adopted October 9, 1952.

17. "Permitted purposes" were defined to include: "(i) the Hudson tubes as authorized and limited on the effective date of this covenant and agreement, (ii) railroad freight

transportation facilities or railroad freight terminal facilities, (iii) the construction, installation and maintenance of railroad tracks and related facilities on vehicular bridges owned by the port authority, (iv) any other railroad facility established, acquired, constructed or otherwise effectuated by the Port Authority (including but not limited to Hudson tubes extensions) as to which the port authority shall have first certified either that said other railroad facility is self-supporting as hereinafter defined or, if not, that at the end of the preceding calendar year the general reserve fund contained an amount equal to 1/10 of the par value of bonds of the port authority which were outstanding at said year end and which were legal for investment as defined in the general reserve fund statutes and that the group of facilities consisting of such other railroad facility and of all prior other railroad facilities will not produce deficits in excess of permitted deficits as hereinafter defined."

18. With respect to permitted purpose (iv), a passenger railroad facility would be deemed to be "self-supporting" if the "amount estimated by the port authority for the ensuing 10 years to be the average annual net income (computed without deduction of debt service) derived from or incidental to such facility equals or exceeds the amount estimated by the port authority for such 10 years to be the average annual debt service upon bonds for purposes in connection with such proposed facility."

19. If a passenger railroad facilty [other than the Hudson Tubes, as defined in the statute, or a facility situated upon a vehicular bridge owned by the Port Authority] was not "self-supporting," then none of the revenues or reserves of the Port Authority (no matter how substantial)

could be used for that passenger railroad facility beyond the "permitted deficits" of the facility.

20. "Permitted deficits" were defined to mean that the total estimated deficit (after including estimated debt service) for "the ensuing 10 years" as certified in writing by the Governors of the two States of the Hudson Tubes system as authorized and existing at the time of the 1962 legislation and of any additonal non "self-supporting" passenger railroad facility could not exceed one-tenth of the General Reserve Fund as of the calendar year prior to the certification.

21. On September 1, 1962, following enactment of the Hudson Tubes-World Trade Center legislation referred to above, the Port Authority, through a wholly-owned subsidiary (Port Authority Trans-Hudson Corporation), assumed ownership and operating responsibilities over the Hudson Tubes. The Commissioners' 1962 certification made with respect to the acquisition of the PATH System was made on the basis of an opinion of A. Gerdes Kuhbach, the Director of Finance of the Port Authority, which was prepared at the request of the Commissioners. (Stip. 201-209) • • •

22. The 1962 Annual Report of the Port Authority (p. 32) stated:

> "The Port Authority became a rail transit operator at 12:01 a.m. on September 1, 1962, when the Port Authority Trans-Hudson Corporation (PATH), a subsidiary of the bi-state agency, acquired title to and began operation of the Hudson

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Tubes, the former Hudson & Manhattan Railroad System.

"The assumption of responsibility for operating and rehabilitating the H&M system was the signal for the commencement of a projected $150,000,000 modernization program to change this rundown but key interstate rapid transit line into an efficient, convenient, and dependable public transportation service.

"Proposals for the acquisitions and rehabilitation of the Hudson & Manhattan were first publicly advanced by the Port Authority in September, 1960, following intensive studies of the Port District commuter rail situation over a period of many years.

"The Hudson & Manhattan, in bankruptcy since 1954 and hampered by obsolete and inadequate facilities and equipment, faced abandonment. In view of the key role which the line played in the Port District's transportation system, such abandonment could not be permitted.

"It was on this note that the Port Authority proposed late in 1960 that it should be authorized to acquire, operate and rehabilitate the H&M. At the same time, the Port Authority advised that investors in its bonds should be given adequate safeguards by the Legislatures of New Jersey and New York against the irreparable impairment of Port Authority credit which would result if there were no limit to the Port Authority's future involvement in additional deficit undertakings."

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23. Neither the 1963 nor the 1964 annual reports of the Port Authority referred to the 1962 Covenant, but subsequent reports explicitly referred to the Covenant.

24. The 1971 Annual Report of the Port Authority (page 57) stated:

> "The 1962 statutes adopted by the Legislatures of the two States, which authorized Port Authority acquisition of the interstate Hudson and Manhattan Railroad, specifically recognized and met the fundamental need of protecting the credit of the Port Authority to insure that it could continue its self-supporting programs so vital to the economy of the two States in accordance with the directives of the two Legislatures. The Legislatures recognized that the credit of the Port Authority would be impaired if the Authority undertook responsibility for the operation of such a perpetual deficit facility, unless the States entered into a contract with the Authority bondholders which gave assurance that additional deficit financing of future railroad projects would be undertaken only within specific financial limits." (Stip. 210-212) • • •

26. The 1973 Annual Report of the Port Authority (Stipulation, Exhibit III) stated:

> "The 1962 statutes adopted by the Legislatures of New York and New Jersey, which authorized Port Authority acquisition of the interstate Hudson and Manhattan Railroad, provided by way of a statutory covenant with the holders of affected bonds that deficit financing of additional passenger railroad

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facilities would be undertaken only within specific financial limits.

"Effective May 10, 1973, the two States amended the 1962 statutes to provide that this statutory covenant shall not apply to the holders of obligations issued by the Authority after such date. Thus, the covenant does not apply to the holders of $100 million Consolidated Bonds, Fortieth Series, issued by the Authority on June 20, 1973, or to the holders of $100 million Consolidated Bonds, Forty-first Series, issued by the Authority on October 9, 1973, nor does the covenant apply to the holders of the Authority's promissory notes issued in an aggregate of $100 million to fourteen banks and trust companies in connection with the December, 1973 bank loan. The last issue of Port Authority obligations to which the statutory covenant attached was $150 million Consolidated Bonds, Thirty-ninth Series, due 2007, issued by the Authority on February 9, 1972. As recommended by Governor Byrne, a bill intended to repeal the statutory covenant with respect to all outstanding bonds has been introduced in the New Jersey Legislature. This bill provides that it is to take effect upon the enactment of concurrent New Jersey-New York legislation and a similar bill has been introduced in New York. Litigation is currently pending in New Jersey and New York seeking to invalidate the existing statutory covenant. Cross motions for summary judgment have been made by plaintiffs and by defendant Port Authority in both the New Jersey and New York actions. In addition, United States Trust Company of New York is joined

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as a defendant in the New Jersey action as Trustee for the 40th and 41st Series of the Authority's Consolidated Bonds, as the holder of a significant amount of outstanding obligations of the Authority, and as a class representative on behalf of the holders of all outstanding bonds of the Authority, and has joined in the Authority's motion for summary judgment."

27. In 1973, PATH served 25.4 percent fewer passengers than in 1972 because of a nine week strike called by the Brotherhood of Railway Carmen. Following the strike settlement, PATH returned to service with 20 percent fewer riders and soon returned to a level 12 percent below 1972. It was only at the end of 1973, with the impetus of the energy crisis that PATH traffic returned to a level only 2 percent below 1972. (see Exhibit III, page 15). According to the 1973 Annual Report submitted by PATH to the Interstate Commerce Commission, the net operating deficit of PATH in 1973 was $17,322,355*. The total 1973 deficit as reported to the Interstate Commerce Commission was $22,733,475, which included interest on unfunded debt in the amount of $6,281,934, which was charged to PATH by the Port Authority to reflect an amount equivalent to the Port Authority's interest cost on the investment in PATH's road and equipment, including the terminal facilities at the World Trade Center and the Journal Square Transportation Center. The total cumulative deficit of PATH through the end of 1973, as reported to the Interstate Commerce Commission, was $125,079,735*. (Stip. 212-214) • • •

* These figures do not include general administration expenses. The Port Authority has been advised by the ICC that it will have to amend its 1973 and prior year reports to reflect, as well as include in all future reports, the cost of general administration expenses.

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In 1973, using the Port Authority's accounting procedures, the PATH deficit was $24,913,000, calculated as follows:

Gross Revenues	$ 9,426,100
Operating Expenses	27,596,100
Net Operating Deficit	18,170,000
Debt Service*	6,743,900
Deficit	$24,913,900

The main difference between the ICC figures and the above figures are: (1) the ICC figures do not include general administrative expenses of $4,274,600, whereas the Port Authority's figures do; (2) the ICC figures include depreciation of $2,556,200, whereas the Port Authority's figures do not; and (3) the ICC figures include only interest, on capital investment, of $6,281,900 whereas the Port Authority's figures include both principal and interest of $6,743,900.

PATH in fact has incurred an annual deficit after debt service for each of the last five years in excess of 10 percent of the General Reserve Fund. Accordingly, under the

* A certain amount of certain Consolidated Bond issues has, since 1962, been allocated by the Treasurer of the Port Authority to PATH. The figure in the above chart represents the debt service on the aggregate amount of such allocations, excluding such allocations attributable to construction in progress, which is capitalized until completion. Thus the debt service figure in the above chart includes allocations attributable to PATH Condemnation Payments, World Trade Center Terminal, Passenger Cars and Other Completed Rail Rapid Transit, and excludes allocations attributable to work in progress at Penn Station-Newark and on rail rapid transit and almost all of the Journal Square Transportation Center which was put in service in 1974. See Chart on p. [684a] for principal amounts invested.

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terms of subparagraph (b) of the 1962 Covenant, the Port Authority would have been precluded from applying any of its revenues or reserves to any other deficit passenger railroad operations.

28. The Port Authority referred to the existence of the 1962 Covenant in the Official Statement issued in connection with each of the Consolidated Bond financings subsequent to the enactment of the 1962 Covenant.

A preliminary Official Statement was usually distributed to the underwriting group, certain selected dealers and financial institutions approximately a week prior to the commencement of an offering. The final Official Statement was distributed to each original purchaser of Consolidated Bonds either prior to or with delivery of the Bonds or confirmations thereof. The annual report of the Port Authority is also distributed broadly. For example, 11,700 copies of the 1973 Annual Report have been distributed, including copies to all New York and New Jersey legislators, all Port District Congressmen and Senators, 750 copies to media representatives and 1,800 copies to a list of dealers in municipal bonds, registered bondholders, banks, trust companies, insurance companies and other financial institutions. Those on the latter list have specifically expressed interest in receiving the report.

29. The Port Authority has invested $185,800,000 of its own funds in PATH as of December 31, 1973. The accumulated ICC operating deficits of PATH totals $125,000,000, of which approximately 17 million constitutes depreciation. The breakdown of the $185,800,000 capital investment of the Port Authority is as follows:

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PORT AUTHORITY OF NEW YORK AND NEW JERSEY
CAPITAL INVESTMENT IN PATH
THROUGH DECEMBER 31, 1973
(In Millions of $)

Journal Square Transportation Center	$ 28.5
Condemnation Payments	54.7
PATH Terminal at W.T.C.	37.8
Passenger Cars	35.4
Other Rail Rapid Transit—completed	27.0
Penn Station Newark—in progress	.3
Rail Rapid Transit—in progress	2.1
	$185.8

(Stip. 215-218) • • •

30. Under the aegis of the Port Authority, PATH became one of the nation's most modern and efficient rapid transit systems. It was the first rail transit system in the world to be fully air-conditioned. In 1973, when PATH was shut down by a strike for two months, PATH carried more than 30,000,000 passengers with an overall on time performance of 97.2 percent. (1973 Port Authority Annual Report, page 11.) PATH carries more than 70 percent of all passengers entering New York City by rail from New Jersey. (PATH—Plainfield Information Booklet, page 2.)

31. The current levels of peak hour traffic carried from Hoboken and from Newark are the highest ever in the history of the system. Even in the late 1920's when the H&M carried nearly three times as many daily passengers, the peak hour demand at Hoboken totalled about 12,500 (vs. 16,000 today) and at Newark approximately 4,000 (vs. 7,300

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today). The costs incurred for crews and equipment are determined principally by peak hour requirements. Nearly one-half of PATH's current weekly traffic is carried in the two peak hours. The basic PATH interstate fare has remained at 30 cents since October 31, 1961. (Stip. 219) • • •

At a meeting on June 7, 1973, the New York and New Jersey Commissioners voted unanimously to increase the PATH fare from 30 cents to 50 cents because of increased operating costs, the 1972 deficit of $20,090,000 and the expectation that there would be no substantial increase in traffic. Neither of the Governors exercised his veto power over the proposed increase. During the following three months Governor Rockefeller of New York was enlisting support for the proposed $3.5 billion transportation bond issue in New York. A strong opponent of a prior New York proposed bond issue which failed, Mr. Theodore H. Kheel, publicly suggested that his prior strong support of the 1973 bond issue would be re-evaluated if Governor Rockefeller did not change his position regarding the proposed PATH increase. Governor Rockefeller sent Mr. Kheel a letter evidencing his support for only a 5 cents PATH fare increase and Mr. Kheel was quoted as saying that the New York Commissioners would "knuckle under to the Governor". *N.Y. Post,* September 26, 1973.

On September 21, 1973 Governor Rockefeller issued a statement to the effect that the PATH increase should be limited to 5 cents rather than the 20 cent increase approved by the PATH Commissioners and not vetoed by the Governors. At a meeting on September 26, 1973, all five New York Commissioners, contrary to their position four months earlier, voted to limit the proposed increase to 5 cents. The New Jersey Commissioners, however, voted in

the negative, and since a majority vote of the Commissioners of each state is necessary for Port Authority action, the proposed fare increase application remained at 20 cents. Mr. Kheel, however, continued his support of the 1973 New York Bond issue, and was quoted as stating that "I can't ask Governor Rockefeller to do more than deliver all the Commissioners of New York State, and that he did. . . ." *N.Y. Post,* September 27, 1973.

In February 1974, Commissioner Sagner appeared on behalf of Governor Byrne at the ICC Hearing on the PATH fare increase to state New Jersey's opposition to the PATH fare increase to 50¢. On February 14, 1974, following the stated opposition by Governor Byrne and Governor Wilson to the PATH fare increase, the Port Authority Commissioners voted unanimously to rescind their request to the ICC to approve the increase in the PATH fare. The PATH fare has remained at thirty cents. The present fare charged by the federally subsidized AMTRAK from Newark to Penn Station New York City is $1.00; the present Penn Central fare between those stations is $.75.

C. 1971 Bi-State Legislation

1. In April 1970, Governors Cahill and Rockefeller announced a joint program to increase the Port Authority's role in mass transportation by building a rail link to John F. Kennedy International Airport and extending PATH to Newark International Airport and other parts of New Jersey. According to the April 20, 1970 issue of *The (Newark) Evening News,* Governor Cahill said "one purpose of the legislation that will be introduced in both state bodies will be to erase the authority's impression that as long as the PATH system is operating at a loss the authority is absolved from any further responsibility for mass transit." Governor Cahill was also said to have noted that the Port Authority interprets the PATH legislation as absolving it from any further responsibility for mass transit and to have stated that the new bill will express "the intent of both legislatures that the PA do more in the area of mass transportation."

2. In March 1971, two days of joint hearings were held in New York and New Jersey by the New York State Assembly Committee on Corporations, Authorities and Commissions and the Autonomous Authorities Study Commission of the New Jersey State Legislature with respect to the relationship of the Port Authority to mass transportation. At the outset of the hearings, New York State Comptroller Levitt pointed out that the net revenues of the Port Authority increased from $68 million in 1961 to $115 million in 1970. During the ten-year period, the amount applied to interest on debt and scheduled long-term debt retirement ranged from $34 million to $54 million a year; over the ten-year period approximately $454 million in funds were available beyond interest and scheduled principal repayments and during the three prior years, approximately $55 million to $60 million a year was left. A large proportion of these moneys, almost $360 million, was applied by the Port Authority to capital construction through short-term borrowings.

Austin Tobin, then Executive Director of the Port Authority, testified at length concerning the history of the Port Authority and its credit requirements. Mr. Tobin noted that the Port Authority had been working on rail access to Kennedy Airport "for many years, and we have a concrete plan on that, that we are in the course of moving

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forward on it." With respect to a Newark Airport rail link, Mr. Tobin said, "there still might be some possibility in a PATH extension in some way, or in a Jersey Central extension. We are not optimistic on some of the PATH, we are not optimistic, and think that the other way would do a better job, but that is in the process." Mr. Tobin also stated that the PATH deficit "will go up to $30 million a year."

Mr. Tobin further stated that if the tolls on the Port Authority's bridges and tunnels were doubled, "I don't think we would lose many vehicles . . . my judgment is that you wouldn't, other than raising holy political hell, if we just looked at it from the traffic standpoint, it wouldn't affect much." Mr. Tobin said that if the tolls were doubled, the increased revenues to the Port Authority would be "between $50 million and $70 million." Mr. Tobin also stated that if the Legislatures "wish to change the nature" of the Port Authority and "give us the same type of State resources and back-up as the Metropolitan Transportation Authority has, and has to have, . . . we are ready to take on anything that you will give us the tools to work with, and be delighted. We will work within the public field, and it is just as much fun for us to run choo-choos as airports." Mr. Tobin further stated that various other authorities engaged in mass transportation such as the San Francisco Bay Authority, the Metropolitan Transportation Authority, the Chicago Authority, the Boston Area Authority and Authorities in Detroit and Montreal are all supported by the taxing power of the State. (Stip. 220-224) • • •

Assemblyman Koppell of New York referred to a report by the First National City Bank which suggested the appropriateness of imposing higher and economically more reasonable charges for the use of highways and river

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crossings in order to transfer badly needed added revenues to mass transit use. Mr. Tobin replied that "the penny surpluses from the tunnels and bridges are picking up the immense deficits from PATH." Mr. Koppell stated that the First National City Bank report specifically points out that tolls have been stable for 30 years and that the Hudson crossing tolls were fifty cents at a time when subway fares were a nickel; now subway fares cost six times as much*, while the tunnel and bridge tolls are the same. Mr. Tobin stated that an increase in bridge and tunnel tolls is opposed by every public official that is in any way concerned with traffic and that if the tolls were doubled, "it could not go under the law [to] mass transit anyway . . . we could use them for other facilities supported by the General Reserve Fund, but you could not, under the law and the constitution, use them for mass transit facilities." (Stip. 225-226) • • •

There was extensive discussion concerning the possible repeal of the 1962 Covenant. Assemblyman Koppell asked whether the Covenant could be repealed "not only for the future, but for the past" on the basis of the legislative finding "that in the exercise of our right to protect the people of the two states, we find that this covenant stands in the way of the proper development of mass transportation facilities, which is essential to the people's good and welfare." (Stip. 227-228) • • •

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* The subway fare as of December, 1974 is $.35 [footnote added by stipulation.]

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Charles Wodehouse, Chairman of the Railroad Committee and member of the Executive Committee of the New Jersey Citizens Transportation Council, stated:

> "It should go without saying that the continuing strangulation with which this area is faced due to clogged roads and lack of transit necessary to relieve that condition, absolutely must be met head on, and now, if the area is to survive as a job-producing, revenue-producing complex to support its population."

Mr. Wodehouse made "a special request that plans and action go forward without delay for high-speed transit for Newark and the New York Airports." (Stip. 229) • • •

3. The hearings included the following chart that had been submitted to the Farley Committee in 1961 with respect to the net revenues and investment of the Port Authority in each of its facilities as of December 31, 1960, together with the number of years that each facility operated at a loss.

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PORT OF NEW YORK AUTHORITY INVESTMENTS AND REVENUES

As Submitted to Senator Frank S. Farley, Chairman, New Jersey Senate Committee Created to Investigate the Port of New York Authority.
(000 Omitted)

	Total Investment		Net Revenues			
				Cumulative		
Facility	As of 12/31/60	After Completion of Constrn. Program Under Way	Year 1960	Amount	Yrs. in Svc.	Years in Deficit Oper.
N.Y. Intnl. Airport	$ 288,500	$425,000	$ 7,177	$ 16,966	14	7
LaGuardia Airport	27,205	90,000	(65)	1,123	14	7
Newark Airport	39,383	50,000	(527)	(9,296)	13	13
Teterboro Airport	10,540		(439)	(4,162)	12	12
Heliports	706		(103)	(288)	7	7
Grain Terminals, Grain Elevators, & Columbia St. Pier	3,734		(99)	1,040	15	3
Port Newark	62,249	125,000	498	4,908	13	3
Erie Basin Piers	8,930		266	405	3	—
Hoboken Piers	17,807		352	1,442	9	4
Brooklyn Piers	60,971	90,000	(197)	(431)	5	4
Elizabeth	9,452	150,000	(Not yet in operation)			
PA Building	22,457		636	(3,040)	28	21
N.Y.Truck Terminal	9,923		(284)	(5,459)	11	11
Newark Truck Term.	8,120		(391)	(2,065)	11	10
N.Y. Bus Terminal	26,272	45,000	(4)	(5,476)	11	11
Holland Tunnel	57,950		3,049	82,871	30	—
Lincoln Tunnel	184,062		(83)	16,357	24	10
Geo. Washington Br.	143,680	260,000	9,207	99,424	30	8
Staten Isl. Bridges	30,590	45,000	209	(14,724)	33	22
Total	$1,012,500		$19,202	$179,592		

Note: Parentheses denote deficits.

(Stip. 231-232) * * *

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5. In June 1971, the Legislatures of New York and New Jersey enacted legislation authorizing the Port Authority to extend passenger rail transportation to Kennedy International Airport and to Newark International Airport and Cranford (Chapter 245, Laws of New Jersey of 1971). While this legislation was pending, the Port Authority obtained opinion letters from the New York firms of Hawkins, Delafield & Wood (May 3, 1971) and Davis Polk & Wardwell (June 3, 1971), which concluded that the proposed rail extensions were subject to the provisions of the 1962 Covenant (and could not be financed out of Port Authority revenues or reserves unless "self-supporting"—PATH alone having used up all of the "permitted deficits") even if the Legislatures were to amend the statutory definitions of "air terminals" (1947 Laws of New York, Ch. 802, §3; N.J.S.A. 32:135.3) so as to bring the proposed rail extensions within those definitions. (Stip. 233) • • •

7. On December 8, 1971, the First Boston Corporation, having been commissioned to do so earlier in 1971 by the Port Authority, issued a Passenger Rail Transportation Study. In analyzing the proposed airport rail links, First Boston noted "The essential problem which is posed by these undertakings is created in the statutes and resolutions by which the Port Authority is bound; and particularly the joint State covenants of 1962, which in effect prohibit the Port Authority's involvement in additional passenger transportation projects unless they are self-supporting." According to the First Boston Study the 1962 Covenant "precludes general credit financing of any passenger transportation project, no matter how desirable, for which projects show an operating profit below debt service requirements." Since federal funds could be provided only

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for construction of new facilities on a matching basis and not for operating expenses, "any project would have to cover its operating and maintenance costs and a large portion of debt service from the fare box." The study stated that the project could be financed by the Port Authority under existing statutes and resolutions if:

> "(1) it were self supporting, or
>
> "(2) if a legal opinion is obtained (which may require litigation) supporting either theory under (A) and (B) above [the "airport adjunct" theory or a theory that financing of passenger rail mass transit could be considered "to or for the benefit" of Consolidated Bondholders], or
>
> "(3) the project does not incur (along with present PATH deficits) an aggregate annual deficit in excess of 10% of the General Reserve Fund.
>
> "This third approach opens three possibilities:
>
> "(A) Application of federal urban passenger rail transportation projects. The Urban Mass Transportation Act of 1970 provides for sizeable grants for acquisition or construction of new facilities on a matching basis; grants, however, are not to be applied to operating expenses. Therefore, any project would have to cover its operating and maintenance costs and a large portion of debt service from the fare box. Depending, however, on the particular project's projected revenues and the grants obtained, the Port Authority might be able to effectuate pas-

senger rail transportation projects with such assistance. In particular, airport rail links could probably benefit from these grants, but, once again, their costs would have to be detailed to determine if, with these grants, they would be self-supporting or within the 10% aggregate deficit limitation.

"(B) An increase of PATH fares to a level sufficient to cover the present and projected PATH deficits, thus permitting an amount equal to 10% of the General Reserve Fund moneys to be applied to other passenger rail transportation projects. The PATH per-passenger loss for 1970 was approximately 35¢. If the PATH fare were increased by this much, assuming that future traffic patterns and operating expenses were to remain the same, there would be no deficit at all resulting from PATH operation, and the Port Authority might incur up to an annual deficit of about $12.7 million on other passenger rail transportation projects. Although a 35¢ increase is impractical, any increase up to that amount would free a proportional amount of the 1962 mass transit limitation as measured by 10% of the General Reserve Fund for use in other passenger rail transportation projects. Because annual deficits of PATH have been increasing over the years since its acquisition (e.g., an increase from $10.9 million to $12.3 million for 1968 to 1969 and from $12.2 million to $13.2 million for 1969 to 1970), fare increases would probably need to be escalating, depending on the rate of PATH expense increases. The importance of the ability of the Port Authority to raise fares on PATH to reduce the deficits below the statutory maximum can only be determined after the cost and engineering figures on the proposed rail links are completed and any resulting deficits are known.

"(C) Use of additional financing capacity engendered by growth of the General Reserve Fund. At the rate of future financing contemplated by the Port Authority, the General Reserve Fund will grow at about $10 million per year—this means that about $1 million per year would be added to the allowable annual deficit to be incurred in passenger rail transportation projects. Even if deficits of PATH were not to increase over the next few years, this contribution alone is really too small to enable significant participation by the Port Authority in deficit passenger rail transportation projects."

"We do not have enough information on the Airport rail link project to quantify whether the dollars which might be released for deficit passenger rail transportation under (A), (B), (C) or a combination thereof would represent a sum of money sufficient for successful completion of the project."

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The study also discussed two ways of financing beyond the provisions of current resolutions and statutes. One involves the imposition of what might be called a mass transportation "surcharge" and the other involves use of funds already being generated by the Port Authority. Each, however, would require 60% approval of the aggregate of outstanding Consolidated Bond holders. The study discussed three programs, one of which falls in the first category, and the other two in the second, as follows:

"(1) Increase the tolls on all Port Authority bridges and tunnels by some percentage, say 50%, and deposit the revenues into a 'transportation fund', this fund to meet debt service on a series of bonds financing passenger rail mass transportation. (A portion could be retained to cover expenses of the program.) This diversion of funds would require approval of 60% of the Consolidated Bond holders, in that the use of these funds for passenger rail transportation purposes is prohibited by the 1962 Covenant and is limited by the Series Resolution of each issue of Consolidated Bonds.

"The States of New York and New Jersey would then guarantee to the Port Authority *any difference between gross revenues collected after toll increases and higher gross revenues collected before toll increases.* This would bring into being a State financial contingent liability and would require legislative authorization; a *direct* guarantee of revenues creates a debt on the part of the state and would require a voter referendum and legislative

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action in New Jersey and a constitutional amendment (which itself requires approval of two successive legislatures before submission to a voter referendum) in New York; a moral obligation similar to that of the New York State Urban Development Corporation or New York Housing Finance Agency to make up the difference in revenues would not require such extensive legislative action and voter approval but would only require approval by both legislatures. Therefore, a law providing for a direct guarantee by the States would probably take 18 months or more to enact, whereas moral obligation could be obtained much faster. There is not much of a possibility that such an obligation would have to be honored unless traffic patterns were temporarily altered because of the fare increase, or unless automobile traffic patterns generally in and out of New York City were to change radically, perhaps not immediately but conceivably in the next 10 or 20 years. In this regard, the New York State Comptroller has asked assurances before lending his support in the cases of moral obligation created heretofore that these obligations have only the remotest possibility of being honored. It should be noted that a 50% increase in tolls would produce approximately $40,000,000 of additional revenues and, thereby, $430,000,000 in debt issuing capability. These figures are based on 1970 traffic and, while an increase in the fare might temporarily level off

or reduce traffic, use of these facilities should increase in the years ahead.

"The $40,000,000 of additional revenue projected to permit about $430,000,000 of debt capital is based on a 6% interest cost, the debt to mature in approximately 40 years, and the approximate $40,000,000 annual transportation surcharge to cover annual debt service 1.4 times. The facts that the Port of New York Authority will continue to retain its current income ($1.00 round trip) on the bridges and tunnels, that there would be a two-State moral guarantee these revenues will not decrease from their recent highest levels, and there is the probability of increase in these revenues through additional traffic, should enable the Port of New York Authority Consolidated Bonds to remain a highly rated investment security. Since the Consolidated Bond Reserve Fund and the General Reserve Fund have been left intact for building the equity for future Port projects, this plan might be more palatable to the present holders of the Port Authority Consolidated Bonds than would the next plan discussed.

"The major advantage of this plan is that the bonds secured by these toll increases would sell readily; their security, of course, would depend on tunnel and bridge traffic, but the new bonds would have a first lien on any increased amount of fares of these facilities.

"There are several drawbacks to this approach, however: (a) a monetary inducement (similar to that required in Triborough Bridge experience) would be necessary simply to make bond holders 'go to the trouble' of consenting to the amendment by sending in their proxy statement. This consideration would be affected by the distribution of the issue. (b) The difference made up by the States might dwindle since gross revenue guarantees do not provide for the increases in operating expenses incurred in operation of the bridges and tunnels. An additional fare increase might therefore be required to provide sufficient coverage to permit issuance of any additional Consolidated Bonds. (c) The Port Authority would give up some of its financial independence from the States and could be placed in competition with other State agencies for legislative appropriations. (d) The proceeds of the fare increase would have to be used for limited and specific interstate transporation [sic] purposes to avoid 'head tax' problems.

"(2) An alternative plan, which would not involve state action, involves restructuring the present Consolidated Bond Reserve Fund into a limited size fund (similar to the General Reserve Fund) with excess revenues to flow to a new 'Transportation Fund' to be pledged to debt service on a 'Transportation Bond' series. The level chosen for the Consolidated Bond Reserve Fund may be a fixed one, or on some

sliding scale, as is the General Reserve Fund. The size of the Transporation [sic] Fund created would be fixed also as determined by projects to be undertaken. The flow-through of funds would require approval of 60% of aggregate bond holders, because the use of these funds for passenger rail transportation purposes is prohibited by the 1962 Covenant and is limited by the Series Resolution of each issue of Consolidated Bonds. As in the previous case, some monetary inducement would have to be offered to present bond holders to obtain their consent; once again, the percentage increment in coupon rate would be determined by the distribution of the issues and by the coupon of each Series. It is important to note that all Port facilities would be contributing to the excess revenue flow. (In 1970 excess available revenues of the Port Authority were $30 million.) However, it should be noted that some of this excess is already pledged to bank loans. This would permit, upon termination of the bank loan agreements, flexibility on the part of the Port Authority Commissioners and the Governors of the two States; if a greater involvement in mass transportation were deemed necessary, tolls, fees, or other charges might be increased (subject in some cases to approval by the U. S. Secretary of Transportation) without recourse to the State legislatures. A careful analysis of projected revenues is, of course, necessary to

ensure that debt service on Consolidated Bonds would be covered, and that there would still be a sufficient flow into the Transportation Fund to permit coverage of debt service on passenger rail transportation bonds. This alternative will stand up only if there is sufficient flow of revenues to provide a sizable Transporation [sic] Fund from year to year. Potential bond holders must be assured from projections that the Port Authority can flow through revenues as necessary to meet debt service. Because of the second lien aspect these bonds might be more difficult to sell than those of the first alternative. In addition, assurance must be provided to present bond holders that their security will not be diluted by too many unprofitable projects. Historical revenues (see Exhibit 1), furthermore, show that the Port Authority would be able to support approximately the same amount of passenger rail transprotation [sic] debt (without any toll increase) under this plan as it would with a bridge and tunnel toll increase under the previously described plan. While the fare and toll increases of 50% might bring in approximately $40 million annually (not allowing for increase in operating expense, consequent further toll increase, and possible traffic dropoff), Exhibit 1 shows the excess revenues from all facilities to be about $30 million in 1970.

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"If an annual amount of $30 million continued to be available for debt service on transportation bonds, then, at a rate of 6%, about $325,000,000 in debt could be supported at a coverage of 1.4 times debt service. This figure does not give consideration to the possible growth in Port Authority normal operating revenues, and the potential savings in current debt charges which might be saved by extending the maturities in refunding part of the bank debt.

"(3) A third solution would involve a bi-State guarantee of the level of the General Reserve Fund, such that all Consolidated Bond holders would benefit thereby. This would be a moral obligation of the New York State Urban Development Corporation type, and would allow use of funds by the Port Authority at its discretion. This course of action would essentially be a guarantee of the payment of the Port Authority's debt service, since the General Reserve Fund is maintained from net revenues after debt service. It is felt that bond holder approval of expenditure for rail purposes would *still* be required in the selection of this alternative. The States' contingent liability would be significantly greater with this approach, and therefore this alternative is the least attractive of the three as to Port Authority autonomy, although perhaps the most appealing to present bond holders." (Stip 242-251) * * *

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9. In June 1972 it was reported that on the basis of an engineering cost study by Louis T. Klauder & Associates, the Port Authority and New Jersey Department of Transportation concluded that the proposed extension of PATH via Newark Airport to Cranford was not economically feasible under the terms of subparagraph (b) of the 1962 Covenant. Under the Cranford Plan, the Central Railroad of New Jersey would have continued its commuter operations into Newark from points west of Cranford and would have competed with the Cranford service proposed for PATH.

10. In June 1972, the State of New York passed a bill repealing the 1962 Covenant. Ch. 1003, Laws of N.Y. 1972. Governor Rockefeller's message on the signing of that legislation stated:

"I am approving this bill in order to give incentive to the Port of New York Authority to proceed with urgently needed mass transportation facilities in the metropolitan region.

"Passed with overwhelming bipartisan support in both houses of the Legislature, the bill removes the absolute statutory prohibition against the use of the revenues of the Port of New York Authority for railroad purposes. That statutory covenant, together with the provision of the bi-state compact creating the Authority that neither State will construct competing facilities within the Port District, could forever preclude the two states from undertaking vitally needed mass transportation projects. In removing the present restriction, the bill would

not jeopardize the security of Port Authority bondholders or their rights to maintain that security.

"My signature on this bill does not make it law unless the same measure is adopted by the Legislature and approved by the Governor of New Jersey. In the period immediately ahead, I shall be working with New Jersey on this question and will be prepared to suggest and approve amendments to the bill which would preserve the traditional high reputation of the Port Authority's obligations within the investment community. I would be prepared to submit such amendments either in the next regular session of the Legislature or, if the need arises, at a special session. In the interim, the Commissioners of the Port Authority can proceed with urgently needed mass transportation projects and the construction of the other vital construction activities in which the agency is engaged.

"New York, by the enactment of this measure, is taking an essential step in its long-range effort to realize the full potential of the Port Authority in meeting the total transportation needs of the New York-New Jersey port district. The Port Authority's active participation in helping to solve the problems of mass transportation in the New York City metropolitan area will inure to the benefit not only of millions of area residents generally, but also to the port facilities operated by the Authority and the workers and businesses that rely on them. This bill is consistent with the original purpose of the Port Authority—to ensure the coordinated development

of terminal, transportation and other facilities of commerce in and about the port district for the greater benefit of the people of New York and New Jersey.

"The bill is approved.

Nelson A. Rockefeller"

McKinney's Session Laws of N.Y., 1972 at 3411-12. The State of New Jersey failed to approve the necessary concurrent legislation.

D. The November 1972 Governors' Agreement

1. On November 15, 1972, following a series of meetings among Governors Cahill and Rockefeller and the Commissioners of the Port Authority, the Governors announced agreement on a bi-State plan of major rail mass transportation development by the Port Authority. The Plan provided for the extension of PATH via Newark Airport to Plainfield, direct rail service from Kennedy Airport to New York City and direct rail service to Penn Station, New York for riders of the Erie Lackawanna Railroad in 6 northern New Jersey counties and 2 counties in New York. The estimated total cost of the plan was $650,000,000 and it was estimated that the Port Authority would invest between $250,000,000 and $300,000,000. The Governors also proposed to eliminate subparagraph (b) of the 1962 Covenant with respect to bonds issued subsequent to the enactment of the legislation proposed by the Governors. (Stip. 251-253a) • • •

2. On December 11, 1972 the New Jersey Senate held an information session to consider the Port Authority mass

transit bills. • • • Representatives of the Port Authority and of Governor Cahill's office stated that the State of New Jersey would have to commit substantially all of the funds then available to the State of New Jersey from the federal Urban Mass Transportation Administration and, in addition, advance $40,000,000 of its own funds to be repaid over the 30-35 year life of the Plainfield project. (Stip. 253a) • • •

3. The legislation embodying the 1962 Covenant was amended effective May 10, 1973 by the States of New Jersey and New York (Chs. 207 and 208, Laws of New Jersey of 1972, Ch. 1003, Laws of New York of 1972, Chs. 317 and 318, Laws of New York of 1973), to repeal subparagraph (b) of the 1962 Covenant with respect to bonds issued after the date of the legislation. Section 3 of the New Jersey statute provided:

> "The amendment made by section 2 of this act [the repealer] shall not take effect with respect to the covenant and agreement made by the States of New York and New Jersey in clause (b) of the first paragraph of section 6 of both chapter 8 of the laws of New Jersey of 1962 and chapter 209 of the laws of New York of 1962 with the holders of 'affected bonds' (as defined in said section 6) issued and outstanding and unpaid on the effective date of this act." § 3, Ch. 208, Laws of N.J., 1972; N.J.S.A. 32:1-35.55(a).

The introductory statement appended to the New Jersey bill provided:

> "This bill provides that an extension of rail transit lines between the city of Newark and the city of

Plainfield shall be part of the Hudson tubes extensions.

"In addition, the bill authorizes improvements to railroad lines connecting with PATH to provide for connections between passenger lines and branches of the Erie-Lackawanna Railroad and the Penn Central Railroad. This will result in improved rail transit service and direct access to and from midtown Manhattan for commuters and residents of Bergen, Essex, Passaic, Morris, Somerset and Union counties in New Jersey and Rockland and Orange counties in New York State.

"The bill is also designed to preclude the application of the 1962 covenant to holders of bonds newly issued after the effective date of this act, while maintaining in status quo the rights of the holders of the bonds issued after March 27, 1962 (the effective date of the 1962 covenant legislation) but prior to the effective date of this act."

4. Port Authority Consolidated Bonds issued prior to May 10, 1973 have varying maturity dates from 1993 to 2007 (unless earlier redeemed).

5. The Erie Lackawanna Direct Access Plan referred to [above] involves the construction by the Port Authority of connecting tracks to Penn Central in Kearny for the Erie Lackawanna Morris & Essex line and in Secaucus for the Bergen County, Pascack Valley and Main lines of the Erie Lackawanna, the construction of a new bridge over the Hackensack River and the construction of a new railroad yard as well as major improvements to Penn Station,

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New York. Under this proposed service, Erie Lackawanna riders could either go directly to Penn Station in mid-Manhattan or continue to transfer at Hoboken to PATH for lower Manhattan. At present, there is no direct ride into Manhattan for any Erie Lackawanna rider. (Stip. 256-257) • • •

8. During the December 1972 information session conducted by the New Jersey Senate the Port Authority proposed to finance the $150,000,000 estimated costs of the Lackawanna program by means of a $100,000,000 federal grant charged to the State of New Jersey and the issuance of $50,000,000 of Port Authority bonds. The debt service on the Port Authority bonds would be financed by making available to the Port Authority a through charge approximately equal to the existing PATH fare at the time of implementation of the direct service plan. The Erie Lackawanna would be responsible for collecting the through charge either from its passengers or from the operating subsidy paid to the Erie Lackawanna by the State of New Jersey. On this basis its was stated that this proposed plan could be effected within the terms of the 1962 Covenant.

9. The PATH extension to Plainfield via Newark Airport was projected during the December 1972 information session to involve capital costs of $240,000,000, of which $150,000,000 would be in the form of a federal grant charged to the State of New Jersey, the Port Authority would invest $50,000,000 and the State of New Jersey would advance $40,000,000. Louis Gambaccini, Director of the Department of Rail Transportation of the Port

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Authority, stated that the Port Authority expected this project to be "barely doable on a self-supporting basis" assuming that these capital funds were available only because the Plainfield project would take over the major portion of the service provided by the Central Railroad of New Jersey and because additional passengers could be served through the construction of a park-ride facility near the Garden State Parkway and by routing the Plainfield extension to a point from which it could serve Newark Airport. Debt service and operating expenses incurred in connection with the Plainfield project would be obtained by PATH directly from passengers on the assumption that the user of the proposed rapid transit service would pay approximately the same fare as was charged by the Central Railroad of New Jersey.

The State of New Jersey's commitment to advance up to $40 million of the necessary financing is evidenced by the following letter, dated August 10, 1973, from the Governor of New Jersey to the Chairman of the Port Authority:

"Dear Mr. Chairman:

"As you know, New York has now enacted legislation identical with our Chapters 207 and 208, P.L. 1972. The Port Authority is thus authorized, inter alia, to:

"(1) Construct improvements providing for direct rail service to Pennsylvania Station, New York, and

"(2) Provide as a Port Authority Trans-Hudson System (PATH) extension rail link between Newark International Airport and Penn Station, Newark, between Newark International Airport and Plainfield, New Jersey, which will also provide service between Plainfield and Newark.

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"The projects are more precisely defined in the laws cited above.

"When I joined with Governor Rockefeller in announcing these plans in November, we stated that these plans anticipated that federal mass transit and airport aid funds would be available to cover a substantial portion of the capital improvement costs with the remainder to be covered by Port Authority funds, revenues from the projects and state capital contributions.

"As to the direct rail links of the Erie Lackawanna to Penn Station, New York, you will recall that we contemplate no state contributions and rather envision the amortization of your capital cost (net of Federal Aid) through operating revenues. The PATH extension does, however, involve capital contributions by the State of New Jersey. In this connection it is important to note that this project will obviate significant programmed capital expenditures by the State in connection with Central Railroad of New Jersey main line improvements and that increasing operating subsidies being paid by the State to that railroad will be substantially reduced when the new program has been completed.

"Although the necessary agreements to effectuate all the matters referred to in this letter will be prepared over some period of time, I know that it is essential to your planning that the State of New Jersey confirm its intention to assume a portion of the costs as outlined below. For example, I understand that the Port Authority is presently preparing

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preliminary applications to the U.S. Department of Transportation for urban mass transportation funds. It is for that reason that I am sending this letter to you today.

"We have agreed that the State of New Jersey will advance up to $40 million for its share of the capital cost of the PATH extension project. I understand that you have included in the capital cost of this project the cost of all labor protective agreements which may be required under the Urban Mass Transportation Act such as for Central Railroad of New Jersey employees. The capital contribution of New Jersey would be paid over to the Port Authority at the time the project is certified. I understand that the agreement with respect to this advance will provide for repayment to the State of New Jersey from net project revenues after the operation and maintenance and debt service charges have been satisfied.

"While I look to the Port Authority to negotiate for all necessary operating rights, particularly those over the Central Railroad of New Jersey property, I recognize that the successful implementation of the project requires that the C & J operating rights be acquired at minimal cost. I have pledged the State's complete cooperation in achieving this end.

"As was always contemplated, the State of New Jersey will cooperate fully in securing the necessary Federal aid. To this end the State will act as Federal aid sponsor for the project designed to improve direct access to Pennsylvania Station, New York.

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"The State will also cooperate with respect to securing Federal aid for the PATH extension project, subject only to our approving the preliminary and final Federal aid application prior to submission. Obviously we must reserve this right of approval since the exact amount of our contribution could be less than $40 million if a substantial portion of this project could be finally qualified or characterized as an adjunct to the Newark International Airport.

"I trust the Port Authority will continue to progress the planning and design of these projects so that they may be implemented as quickly as possible to the benefit of the people of New Jersey.

Sincerely,

/s/ William T. Cahill
GOVERNOR"

(Stip. 258-262) • • •

10. The 1973 [New Jersey Department of Transportation Transit Development] Program stated:

> "The key to the long-range development of the public transportation plan in the [Hunterdon-Somerset-Middlesex-Union Counties] corridor is the extension of the Port Authority Trans-Hudson (PATH) rapid transit system. It is anticipated that PATH will be extended from its present terminus at Penn Station, Newark to Newark Airport and a proposed transportation center terminal in Plainfield, Union County. The commuter rail operations of the Central Railroad of New Jersey and the Reading will be restricted to points west and south of Plainfield. Commuter bus operations will be realigned to provide feeder service from communities in the PATH service area and various points to the west of Plainfield.
>
> "The institution of PATH service will revitalize the public transportation in the corridor and provide an attractive alternative to the private auto for journey-to-work trips. It is anticipated that PATH will reverse the downward ridership trend in both rail and bus modes. The complementary connecting service will be provided west of Plainfield along the CNJ Mainline and the Reading Company trackage. . . . (Stip. 266-267) • • •

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11. A booklet concerning the PATH-Plainfield project, issued by PATH in January 1974, contained the following information "underlin[ing] the importance of the proposed PATH extension":

> "The growth and development of communities along the CNJ Mainline have been spurred directly by the presence of the railroad. They are primarily residential in nature, with a large number of journey to work commuters. The 7,800 passengers who commute each day to Newark and New York City on the CNJ Mainline represent a key economic asset to their communities, earning an estimated $100 million annually.
>
> "Highway access to this Corridor is extremely inadequate and the area traditionally has needed high capacity transit services. The area continues to be strongly dependent on the CNJ service, supplemented by several commuter bus lines.

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"Further, the communities in the Corridor, particularly Plainfield, are counting heavily on continued rail service to spur redevelopment programs in the older sections and support the economic health of the entire area.

"The plight of the CNJ, highway congestion, the energy crisis, and the need for continued economic development underline the importance of the proposed PATH extension.

"Substantial benefits will accrue to Newark and Elizabeth as a result of the PATH project. Most important for Newark is direct rail access to Newark International Airport. Although economically unfeasible in the past as a separate service, the changed economics of the Plainfield Service Corridor Project now make airport access possible.

"This rail access will provide increased accessibility to job opportunities for Newark's large work force and will enhance Newark's function as the regional center of commerce and industry. Further, the area adjacent to PATH's Newark International Airport/McClellan Street station will offer Newark opportunities for airport-related development in conjunction with its planned redevelopment programs.

"Elizabeth's Central Business District also will benefit from direct rail access to the airport, which will be only four minutes away on the PATH extension. Elizabeth's business community and residents further will benefit from the inauguration of direct rail rapid transit service into Lower Manhattan. . . .

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"This project will provide significant economic benefits to the entire area from Newark to Plainfield and beyond. The communities along the right-of-way will benefit from improved transit service and the new advantage of direct airport access. This will enhance property values in suburban communities which have developed along the rail right-of-way and stimulate the economic growth of the urban centers. Job opportunities will be created on the transit system and its related facilities and within the off-airport satellite development which is expected to develop. In addition, during the development period, construction will be a significant source of employment for skilled and semi-skilled labor. . . .

"The project is complementary to the anticipated land development in the Plainfield Corridor and consistent with actual or planned land use. This is primarily because communities along the right-of way have developed adjacent land uses in harmony with existing railroad passenger and freight operations. The primary impact will be one of environmental conservation by maintaining and upgrading rail service in the Corridor.

"Based on 1985 traffic estimates, the PATH extension to Plainfield will generate about 9 million automobile and bus miles in travel to and from Corridor stations. By contrast, if rail service is abandoned in the Corridor, an estimated 46.5 million auto and bus miles would be required yearly on the roads leading to Newark and New York City. The saving of 37.5 million vehicle miles per year will result in less highway congestion and less air pollution. In

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addition, it will be far more efficient in terms of the utilization of scarce energy resources. . . .

"The estimated gross project cost of the Plainfield Corridor Service Project is $221,510,000, which will be financed in part by an 80 per cent capital grant under the Federal Urban Mass Transportation Program. The 20 per cent local contribution will be provided by the Port Authority Trans-Hudson (PATH) Corporation, through funds of The Port Authority of New York and New Jersey and, if necessary, by a financial advance from the state of New Jersey to be repaid by The Port Authority.

"The PATH extension to Plainfield is planned to be achieved on a financially break-even basis, thus permitting the taxpayers of the State of New Jersey to be relieved of all subsidy obligations for CNJ service in this area. Further, the State will not have to bear the responsibility for capital improvement programs which had been identified for the CNJ in the Corridor.

"Due to the inherent deficit nature of the existing PATH system and legal constraints on the Port Authority, the project cannot be accomplished without the assistance of the Federal grant."

On April 1, 1974 PATH submitted an application to the federal Urban Mass Transit Administration for a capital grant in the amount of $201,527,000 to cover 80 per cent of the capital costs of the Plainfield project. That application has been deferred. (Stip. 267-270) • • •

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12. • • • On October 24, 1974, Frank C. Herringer, the Administrator of UMTA, stated that his agency had deferred action on the application for approximately $200 million in UMTA funds for the PATH-Plainfield project because the application submitted by the Port Authority in April 1974 failed to include a certification of how the local financial share of approximately $50 million would be obtained. According to Administrator Herringer, the Port Authority had been advised of this deficiency in June 1974, but had not responded to this advice.

IV. Federal Mass Transportation Policy

• • •

3. In July 1964, Congress enacted the Urban Mass Transportation Act of 1964 (49 U.S.C. §§1601 et seq.), expressing for the first time a federal legislative interest in the support of urban mass transportation systems. In enacting the 1964 act, Congress found (49 U.S.C. §1601 (a)):

"(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

"(2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic

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congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

"(3) the Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems."

The purposes of the 1964 act were declared to be (49 U.S.C. § 1601(b)):

"(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

"(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economic and desirable urban development, with the cooperation of mass transportation companies both public and private; and

"(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs."

4. The scope of the 1964 Act was expanded by the Urban Mass Transportation Assistance Act of 1970 on the basis of a finding by Congress (49 U.S.C. § 1601a) "that the rapid urbanization and the continued dispersal of population and activities within urban areas has made the ability of all citizens to move quickly and at reasonable cost an urgent national problem."

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5. In November 1974, Congress enacted the National Mass Transportation Assistance Act of 1974, which provides $11.8 billion over the next 6 years for mass transit capital expenditures and, for the first time, operating subsidies. Of the $3.975 billion in federal funds for operating subsidies provided by the Act, New Jersey would receive approximately $177 million, New York City would receive $563 million and the rest of New York State would receive $101 million. The federal operating subsidies are required to be matched by an equal amount of State or local tax revenues used for mass transit operations or the undistributed cash surplus, replacement or depreciation funds, cash reserves or new capital provided by a public or private transit system.

The Act contained the following findings by Congress:

"(1) over 70 per centum of the Nation's population lives in urban areas;

(2) transportation is the lifeblood of an urbanized society and the health and welfare of that society depends upon the provision of efficient, economical and convenient transportation within and between its urban area;

(3) for many years the mass transportation industry satisfied the transportation needs of the urban areas of the country capably and profitably;

(4) in recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service;

(5) the termination of such service or the continued increase in its cost to the user is undesirable,

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and may have a particularly serious adverse effect upon the welfare of a substantial number of lower income persons;

(6) some urban areas are now engaged in developing preliminary plans for, or are actually carrying out, comprehensive projects to revitalize their mass transportation operations; and

(7) immediate substantial Federal assistance is needed to enable many mass transportation systems to continue to provide vital service."

On November 19, 1974, during the Senate debate with respect to the Act, Senator Williams, one of the principal sponsors of the Act, stated:

"As we all know, last winter's shortage of petroleum products created a crisis situation in the United States. We have seen gas station closings, long waits to obtain fuel, complex allocation formulas and the possibility of eventual rationing. And this winter we may once again be confronted with a similar situation.

"One of the ways in which we can combat the energy shortage is by improving urban mass transportation. . . .

"If we are to alleviate the energy crisis, remove traffic congestion and the environmental pollution which results, existing transit systems must be kept in operation, their services expanded and new ones must be built. . . .

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"Now there is a great national stake in maintaining and improving our Nation's mass transit programs.

"The issue of mobility and the quality of life afforded thousands upon thousands of our citizens who must depend upon urban mass transportation is at stake.

"To take no action in response to the combined transit and energy crisis would be to condone further deterioration."

Congressman Minish, another of the principal sponsors of the Act, stated:

"[W]ith our present energy situation and the threat of a renewed crisis in this area, the need for mass transit aid has become ever more critical. Buses and rail cars consume only a fraction of the energy that a private automobile does, yet we cannot expect the commuting public to reduce significantly its use of private cars if we do not provide suitable alternative sources of transportation.

"In conclusion, let me say there is a great national stake in maintaining and improving our mass transit systems. The issue here is the quality of life afforded to millions of our citizens. To take no action at this point, or to defer action, would be, in effect, to condone further deterioration of our environment, our energy status, and our quality of life. This must not be permitted to happen."

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Other Senators and Representatives expressed their support for the position of Senator Williams and Representative Minish.

Representative Abzug, speaking in support of the Act, stated:

> "This [Federal] commitment to aid and expand existing mass transit systems and develop new ones is an essential ingredient of a rational Federal policy on energy use, economic development in the large urban areas as well as rural areas, and protection of the environment. . . .
>
> "This bill represents a commitment toward the principle of operating subsidies and recognition of the fact that highway spending is the most expensive way to move the least number of people, at a terrible price to masses of our citizens, the viability of our cities, and the quality of our environment.
>
> "Increased mass transit assistance is needed not just as a political response, but as an urgent initiative. It is needed not just to prevent long lines at the gas stations but for the positive good that it can create.
>
> "Transportation affects every segment of our economy and our lives. It affects where people work and what kind of jobs they can get. For the carless poor, it means very basically the right to work because without public transit they cannot get to their jobs. In rural areas, the complete absence of transit services means that the poor cannot have access to health clinics, educational opportunities and jobs.

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> In the cities, it means that low-income groups, the handicapped, the elderly, and the young, all those who are transit dependent, cannot enjoy the quality of life shared by those who drive. In the cities, too, the existence of highways alone, without comparable mass transit facilities, serves as a dividing line dictating housing patterns, creating ethnic concentrations and preventing social mobility. . . .
>
> "This bill is expected to provide $170 million of the $200 million in operating subsidies sought by New York City for this fiscal year to maintain the fare at its present level. It would also provide the city with $125 million for capital expenditures in the same period.
>
> "It will now be up to the new Carey administration of New York State and the Beame administration in New York City to provide the additional funds to hold the fare at 35 cents, and I am certain that they will make every effort to do so. If it is necessary to place tolls on bridges within New York City to raise the additional funds, then this should be done, but under no circumstances can the people of New York City afford to pay any more money for the basic necessity of transportation. I also support the proposal by Governor Byrne of New Jersey for an independent investigation into the finances and operations of the New York Port Authority, which should be using its huge reserves to subsidize and develop mass transit lines within the metropolitan New York area."

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6. Tolls charged on the Port Authority's vehicular tunnels are not regulated by the Federal Government. The tolls charged on the interstate bridges of the Port Authority are subject to the terms of the Bridge Act of 1906 (34 Stat. 84, 33 U.S.C. §491 et seq.), which provides that the tolls charged "shall be reasonable and just" and that the Secretary of War [later the Secretary of the Army and still later the Secretary of Transportation] shall have the power at any time and from time to time to prescribe such rates. This power is presently delegated by the Secretary of Transportation to the Federal Highway Administrator (32 F.R. 5607, 49 C.F.R. §1.48(i) (1)).

The Secretary of War in 1937 and the Secretary of the Army in 1947, 1948, 1949 and 1950 have rejected complaints asking for a reduction of the basic $.50 toll charged for the use of Port Authority bridges. (Stip. 274-280) • • •

7. • • • On October 16 , 1974, an Administrative Law Judge issued a decision (*Matter of the Walt Whitman and Benjamin Franklin Bridge Tolls*) recommending that the Federal Highway Administrator find that the tolls presently being charged on the Delaware River Port Authority crossings are not "just and reasonable" under the General Bridge Act of 1946 and should be reduced.

The controversy over DRPA's tolls began in April of 1972 when the Authority increased the one-way automobile toll from 50 cents to 60, the commuter toll from 25 cents to 35, and the rate for buses and trucks from 50 to 75 cents per axle on its Benjamin Franklin and Walt Whitman Bridges linking New Jersey with Philadelphia.

Exercising his authority under Federal Laws to ensure reasonable tolls, the Highway Administrator ordered a public hearing held on the DRPA toll increases. Thereafter, in December, 1972, the then presiding Law Judge decided that the new tolls on the Delaware River Port Authority crossings were not just and reasonable and recommended that they be rolled back to the pre-April 1972 levels. (Stip. 281-281a) • • •

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DRPA appealed to the Federal Highway Administrator who on November 5, 1973 issued an opinion and order sustaining the toll increases for commuters and trucks, but ordering the rollback to their pre-April 1972 levels of the one-way automobile toll and bus tolls.

The opinion of the Federal Highway Administrator stated:

> "It is not necessary to dwell at length on the proper meaning of reasonable and just as applied to the toll schedule being considered. All parties to this proceeding agree that DRPA's revenues should be sufficient to achieve a return sufficient to support its total activities, including the operation of the bridges, the PATCO rapid transit system, and the World Trade Division, and provide sufficient coverage for financings. Thus, a reasonable and just toll schedule would be one sufficient to support these activities and requirements." (Stip. 281a-282) • • •

Subsequently, after negotiations with the Federal Highway Administrator, the DRPA prepared a new toll schedule to apply as of January 1, 1974, and filed a request with the Federal Highway Administrator for a stay in order to permit the institution of the new toll schedule. (Stip. 282) • • •

On December 21, 1973, the Administrator held that it would be in the public interest to grant the DRPA's request

and ordered the proposed new toll schedule into effect. The Authority's petition stated that the impending energy crisis and other issues of public interest have produced "a serious and substantial change of circumstances since the 1972 Toll Hearing". The Administrator agreed and stated in his opinion:

> "The dimensions and scope of the present energy crisis were unforeseen at the time the evidence in the administrative record in this case was adduced. At the time the November 5 order was issued, the magnitude of the problem was only dimly perceived.
>
> "Today, the urgent need to structure toll rates for crossings in major metropolitan areas to encourage use of mass transit and carpools is more apparent and pressing." (Stip. 282-283) • • •

7. On July 1, 1974, the United States Department of Transportation submitted to the President of the Senate and to the Speaker of the House of Representatives a Study of Federal Statutes and Regulations Governing Toll Bridges, which recommended (page 10) that federal bridge acts subsequent to the 1906 statute (which are more restrictive than the 1906 act) be modified "so as to permit the imposition of bridge tolls in urbanized areas of 400,000 or more population for the purpose of achieving a more efficient use of the urban transportation system with the revenues from such tolls used for highway or transit capital improvements or transit operating assistance in the urbanized area." The study noted (page 66) that "in some areas (New York, Philadelphia, San Francisco), bridge toll revenues provide significant support for transit capital and/or operating costs, thereby providing transit service improvements which promote decreased dependence on automobile travel. Therefore, it would appear to be in the Federal interest to permit the imposition of tolls which would promote a more efficient utilization of the urban transportation system. Such a policy would not be unjustly discriminatory but more appropriately reflect the total costs of using the facility in peak demand periods." (Stip. 285) • • •

V. Urban Mass Transportation in Metropolitan New York

1. In 1970, the Governors of Connecticut, New Jersey and New York created the Governors' Special Commission on Financing Mass Transportation. The Commission rendered its report in 1972, after an 18-month study aimed at finding long-range solutions for the financing of mass transportation. In its letter of transmittal the Commission pointed out that the problem was one of finding ways of financing the comprehensive mass transportation system which would require massive subsidies if the fares were to be kept within the reach of the users. The report stated:

> "The deficit problem is huge. In the period, 1972 to 1985, the region will need $13.6 billion to finance mass transit operating deficits. This means an average of $1 billion annually will be required for operations alone. In the same period, the region will need at least $7.3 billion to finance capital outlay. The Commission believes this money can be obtained to finance the system and that the region's mass transportation problems can be solved while keeping fares within the reach of all people. . . .

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"The Mass Transit Deficit

"During The Period Covered by This study, the mass transit system experienced recurring financial crises. In response to these crises, various steps were taken to make the system more viable:

1.) existing and newly-created public authorities took over deficit-ridden operations;

2.) state and local governments and, more recently, the Federal government provided various types of financial aid;

3.) fares were increased;

4.) several unprofitable operations were discontinued.

"However, these actions could not overcome the impact of the forces that have been adversely influencing mass transit for more than a decade.

"One of the most important of these was the increasing competition of the automobile. This stemmed from growing incomes, the movement of population to the suburbs, the proliferation of suburban sites of employment, the decline of downtown shopping areas, and the deterioration of mass transit services themselves.

"During the last three years, the already poor financial situation deteriorated even further because of the influence of newly-emerging forces. Among these were:

1.) inflation generally, but more particularly the rapidly mounting cost of labor;

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2.) the downward trend in passengers on certain facilities resulting from fare increases which were expected to raise revenues by an amount greater than that actually realized;

3.) the slow-down in economic activity;

4.) the high cost of protection against crime.

"As a result the gap between passenger revenues and operating costs and debt service of the mass transit system had grown to $420 million by 1970 (Table II-1). This amount, shown in the table, represents an increase of $243 million since 1963, with more than half the increase occurring over the last two years. The size of the deficit is still rising rapidly on the basis of the data now available for fiscal 1971 and 1972.

"Mass transit operations in New York City (excluding private buses) accounted for about 85 per cent of the region's deficit. The remaining 15 per cent was mainly due to the LIRR and PATH, with New Jersey's commuter railroads accounting for about 2.5 per cent.

"In 1963 the deficit was financed almost entirely from the general funds of state and local governments, with some contributions from surpluses of public authorities and public and private bus companies. The aid from all these sources increased markedly over the last decade.

"By 1970 the deficit, even after these injections of funds, was almost $90 million. (Stip. 286-287) • • •

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"There was recourse to devices such as borrowing for current operations, postponement of payments to pension funds, and delay in payment of outstanding liabilities. Clearly, such methods of financing offer no long-run solution to the financial problems of the system."

In its letter of transmittal the Commission summarized its recommendations:

"1. The Commission recommends that each city in the region impose a mass transportation tax on all individuals who live or work in that city. Moreover, the imposition of such a tax must be contingent upon a provision whereby the Federal government will grant a 100 per cent transportation income tax credit to all individuals paying the transportation tax.

"2. The Commission recommends that the Federal government and each of the States should establish a General Transportation Fund and appropriate revenue sources should be credited to that Fund.

"3. The Commission recommends that the States should have the right to use funds received from the Federal Transportation Fund for capital outlay and/or debt service on capital outlay.

"4. The Commission recommends that the Federal share of capital projects that are part of a coordinated regional plan should be increased to 90 per cent.

"5. The Commission recommends that all three states in the region should assume responsibility for

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maintaining the rights of way of mass transportation facilities.

"6. The Commission recommends that a continuing Tri-State Mass Transportation Financing Advisory Panel should be created to study and make recommendations on problems relating to all aspects of financing public mass transportation services.

"7. The Commission recommends the transit user should pay a reasonable share of the mass transportation system's operating costs."

3. In 1967, the New York Legislature enacted Chapter 717 of the Laws of 1967, pursuant to which the Triborough Bridge and Tunnel Authority was merged into the [Metropolitan Transportation Authority] and the transfer of surplus funds of the Triborough Bridge and Tunnel Authority to the MTA and the New York City Transit Authority was authorized in order to maintain the then current New York City subway fare of 20 cents. Claiming that these surplus funds had been pledged to secure outstanding bonds of the Triborough Bridge and Tunnel Authority, the Chase Manhattan Bank, a successor trustee for the holders of $362 million of Triborough Bridge and Tunnel Authority bonds, instituted litigation seeking to prevent the transfer of the Triborough's surplus funds. The complaint of the Chase Manhattan Bank alleged in part that if the transfer of surplus funds were effected without the consent of the bondholders, the New York statute authorizing the transfer would violate the Contract clause of the Constitution of the United States. On February 9, 1968, the litigation instituted by the Chase Manhattan Bank was settled pur-

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suant to a stipulation which authorized the Triborough Bridge and Tunnel Authority to adopt an amendment to its Bond Resolutions by the vote of the holders of not less than ⅔ in principal amount of its outstanding bonds, which amendment would permit transfer of the Triborough's surplus funds to the MTA or the New York City Transit Authority and would authorize an increase in the interest rate of outstanding bonds of ¼ of 1%. The approval of the Triborough's bondholders to this amendment to its Bond Resolutions was obtained.

4. The tolls on the bridges and tunnels operated by the Triborough Bridge and Tunnel Authority subsequently were doubled. In the approximately 7 years since the merger of the Triborough Bridge and Tunnel Authority into the MTA, approximately $305 million of the Triborough's surplus funds has been paid to the MTA to reduce its deficits. There has been no default with respect to any payment to any bondholder of the Triborough Bridge and Tunnel Authority, which has not attempted to issue any further bonds since the settlement of the litigation described in paragraph 3.

5. Deficits estimated to be incurred in 1975 by the Metropolitan Transit Authority have been projected at $450 million. In September, 1974, Mayor Beame proposed that Port Authority funds be used to help reduce such deficits. This proposal prompted the adoption of the following resolution by the General Assembly of the State of New Jersey:

> "BE IT RESOLVED, that the members of the General Assembly of the State of New Jersey go on record

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> in opposition to the use of funds received from residents of New Jersey through bridge and tunnel tolls to offset operating deficits of the New York City subway and bus transit system; and,
>
> "BE IT FURTHER RESOLVED, that a copy of this resolution, signed by the Speaker and attested to by the Clerk of the New Jersey General Assembly, be sent to the Governors of New Jersey and New York, the President of the New Jersey Senate, the members of the Port Authority of New York and New Jersey, the Mayor of the City of New York, and the Chief Executive Officer of the Metropolitan Transit Authority."

6. The MTA is required to establish fares, tolls and other fees which are necessary to maintain the combined operations of the MTA and its subsidiary corporations on a self-sustaining basis.

7. The deficit nature of MTA's rail transit operations is disclosed in reports issued by its outside independent auditors. Thus, in a report dated September 28, 1973, Price Waterhouse & Co. stated that the New York City Transit Authority, which operates the New York City Subway System, received $538 million in operating revenues for its fiscal year ending June 30, 1973 and paid operating expenses of $713 million, leaving an operating deficit of approximately $175 million. This $175 million operating loss for the year ending June 30, 1973 increased the accumulated Transit Authority operating deficit to approximately $694 million. These deficits of the City Transit Authority do not include depreciation expenses, since the Authority's capital costs are borne by the City of New

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York. Approximately $165 million of the $175 million operating loss for fiscal 1973 was financed by a $73 million contribution from the Triborough Bridge and Tunnel Authority, a $75 million contribution of revenue-sharing funds by the City of New York and $17 million in other contributions by the City of New York. The total accumulated deficit after contributions by governmental sources increased from approximately $325 million in 1972 to approximately $335 million in 1973.

8. During the calendar year 1973 the MTA, as shown in reports rendered by S. D. Leidesdorf & Co. dated March 22, 1974, incurred total operating deficits on its three commuter railroads of approximately $104 million. The Long Island Railroad's net operating deficit was in excess of $77 million. That railroad received operating revenues totalling $94.7 million but paid operating expenses totalling $172.1 million and thus incurred a net operating deficit of $77.4 million. The combined operating deficits of the Harlem/Hudson Divisions of Penn Central and the New Haven Division of Penn Central amounted to approximately $27 million. However, the net operating deficit of the MTA for calendar 1973 was reported as approximately $47 million, including depreciation and similar charges of approximately $14 million. The MTA's balance sheet as at December 31, 1973, showed that the excess of its assets over its liabilities had increased to more than $398 million at the end of 1973 from approximately $357 million at the end of 1972. Adding the 1973 operating deficits of MTA's commuter railroads to those incurred by its subway system for the fiscal year ending June 30, 1973, produces a total operating deficit of $279 million. (Stip. 289-294) • • •

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VI. The Financial Position of the Port Authority

• • •

2. In the latter part of 1970, the State of New York Department of Audit and Control prepared a report (No. NY-Auth. 8-70) concerning the Port Authority . . . . The managerial summary of that report was as follows:

> "The Authority's financial condition is very strong. As of December 31, 1969, the Authority had almost $2.1 billion invested in facilities and had cash and investments of some $550 million. More than $1 billion of debt had been retired through the application of income and nearly $1.4 billion in debt was still outstanding. Each year since 1960, except for three years, more than $100 million of additional investment in facilities had been made by the Port. And in each of those three years, more than $80 million was so invested.
>
> "Net operating revenue levels experienced heretofore by the Authority appear adequate to meet existing mandatory debt repayment schedules. Furthermore, these revenues will be augmented by about $36 million a year, perhaps in 1973, when the World Trade Center becomes fully operational. We estimate that, by that time, the Authority will have sufficient resources and cash flow to support another $1 billion of bonding capacity for authorized facilities.
>
> "A further indication of the Authority's financial strength has been its ability to plow back large amounts of current operating earnings into new capital construction. During the last four years (1966

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through 1969), the Authority's net operating revenue and investment income, less interest and mandatory long term debt retirements, has averaged more than $50 million a year. During the past ten years, the Authority has accomplished $324.5 million of construction (about one-third of all its construction during that period) out of operating revenues. Generally, the Authority has done this by borrowing certain amounts on a short term basis at the beginning of each year, and repaying these borrowings before the end of the year. [The Port Authority saved itself about $252 million in interest costs by the use of this technique. (Audit Report, page 21)].

"There were a number of alternatives to the practice of plowing back earnings into new construction. For example, the moneys might have been used for other activities, additional amounts might have been provided to municipalities 'in lieu of taxes' or its rents, tolls might have been reduced, etc., but it would have been necessary to weigh the effect of the alternatives on future revenues and on long-range capital plans, and some of the alternatives would have required Executive or Legislative approval.

"The basic point is that the Authority generates substantial net revenues beyond mandatory debt service. The purposes to which these revenues are applied involves questions of public policy and priority of such importance as to warrant the attention of the Executive and Legislative branches of the two States." (Stip. 318-320) • • •

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4. The following chart compares financial information for 1973 and 1961 based upon the Port Authority's Annual Reports for those two years:

	1973	1961	% Increase
Gross Operating Revenues	$ 373,497*	$ 123,200*	203%
Net Operating Revenues	137,063	67,200	104
Net Revenue before Debt Service	160,678	71,[illegible]3	124
Net Revenue after Debt Service	84,092	37,779	123
Total Reserves	236,764	82,400	187
Bonded Debt	1,734,867	626,000	177
Invested in Facilities	3,300,000	1,116,100	196
Cumulative Debt Retired	1,261,357	538,600	134

* All $ in Thousands.

5. Port Authority reports to bondholders and the general public do not separately identify revenues, expenses or debt service of any particular facility. The Port Authority's 1962 Annual Report contained the following material from the report of outside auditors retained by the 1961 Special New Jersey Senate Investigating Committee:

> "The Authority's financial structure is based on a single enterprise, pooling of revenues concept. Individual facilities are not financed independent of the rest of the Authority. The facilities contribute their revenues for debt service according to their earning power without regard to the amount of bonds which were issued for their construction. For these

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reasons any presentation of net revenues after debt service for individual facilities is not based on actual fact. As pointed out by the Authority in submitting its report such a presentation can only be based on arbitrary assumptions.

"One thing the Authority's report does clearly indicate is that few of its facilities would have been financially feasible without the ability to pool revenues of all facilities."

6. The Port Authority does prepare internal reports showing gross revenues, operating expenses and net operating revenues or deficits for each facility and the published reports of the Authority list the amounts invested in each facility. The following chart is based upon internal Port Authority reports, except that the investment figure is taken from the latest Official Statement of the Port Authority (dated October 1, 1973):

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Facility	(In Thousands of Dollars) 1973 Grosss Revenues	1973 Operating Expenses	Net Operating Revenue (Deficit)	Investment of Port Authority as of June 30, 1973
JFK International	$125,369	$ 67,698	$ 57,671	$ 661,330
LaGuardia	42,064	26,130	15,934	172,200
Newark International	28,501	18,698	9,803	314,500
Teterboro	558	198	360	11,400
Heliports	96	500	(404)	700
Air Terminals	196,588	113,224	83,364	1,160,100
Columbia St. Marine Terminal	325	238	87	4,300
Port Newark	11,941	5,059	6,882	145,800
Erie Basin	739	740	(1)	13,000
Hoboken	873	238	635	18,100
Elizabeth	13,135	2,309	10,826	178,000
Brooklyn	5,353	2,747	2,606	95,900
Cons. Pass. Ship Terminal	2,625	3,229	(604)	2,000
Maritime Terminals	34,991	14,560	20,431	457,100
P.A. Building	4,015	2,096	1,109	23,500
N.Y. Truck Terminal	743	529	214	9,900
Newark Truck Terminal	370	368	2	8,200
P.A. Bus Terminal	11,709	9,318	2,391	60,700
Terminals	16,837	13,121	3,716	102,300
Holland Tunnel	11,754	10,637	1,117	69,300
Lincoln Tunnel	18,012	12,338	5,674	198,700
George Washington Bridge	39,894	14,385	25,509	213,200
Staten Island Bridge	15,065	7,008	8,057	64,600
Tunnels and Bridges	84,725	44,368	40,357	545,800
PATH Corporation	9,426	27,597	(18,171)	212,400
World Trade Center	30,930	23,564	7,366	707,400
Total All Facilities	373,497	236,434	137,063	3,185,100

(Stip. 321-323) • • •

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7. The following chart, showing the application of 1973 and 1961 Port Authority net revenues, was provided by the Port Authority at the request of counsel for Plaintiff:

PORT AUTHORITY OF NEW YORK AND NEW JERSEY
(in Thousands of Dollars)

	Reference	1973	1961
Net Revenue Before Debt Service	(1)	$160,678	$ 71,588
Interest on Bonded Debt	(2)	(49,729)	(14,807)
Mandatory Long-Term Debt Retirements	(3)	(26,047)	(19,002)
Interest on Bank Loans	(4)	(6,775)	—
Bank Loan Payment	(5)	(35,000)	—
Invested in Facilities	(6)	(8,000)	—
Debt Service on Bonds Secured by Trust	(7)	(6,874)	—
Adjustment of Securities Value	(8)	(3,591)	(1,943)
Short-Term Note Maturities			(32,000)
Debt Retirement and Acceleration			(489)
Net Increase in Reserves	(9)	$ 24,662	$ 3,347
Reserves from Prior Years in Excess of Amount of Next Two Years' Bonded Debt Service	(10)	3,675	1,625
Available to Satisfy Reserve Requirements	(11)	28,337	4,972
Applied to Bring:			
General Reserve Fund to 10% of Bonded Debt	(12)	16,806	1,527
Total Reserves to Amount of the Next Two Years' Bonded Debt Service	(13)	7,793	2,424
Sub Total		$ 24,599	$ 3,951

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	Reference	1973	1961
Reserves at Year End in Excess of Next Two Years' (1974-1975) Bonded Debt Service—Held to Meet Obligations in the Following or Subsequent Years	(14)	$ 3,738	$ 1,020

NOTE: 1961 Amounts May Not Add Due to Rounding.

REFERENCES

1. 1973 Annual Report, Statement A, Line 6. The amount shown does not take into account adjustment of securities value.
2. 1973 Annual Report, Statement A, Line 7.
3. 1973 Annual Report, Statement A, Line 7.
4. 1973 Annual Report, Statement A, Line 8.
5. 1973 Annual Report, Statement A, Line 9.
6. 1973 Annual Report, Statement A, Line 11.
7. 1973 Annual Report, Statement I, Line 18.
8. 1973 Annual Report, Statement A, Line 15.
9. 1973 Annual Report, Statement A, Line 14.
10. The amount shown for 1973 was calculated by sub tracting from the Total Reserve Balances at the end of 1972 ($212,102) the total Debt Service for 1973 and 1974 ($208,427).
11. Sum of (9) and (10).
12. The General Reserve Fund was established in 1931 by legislation adopted by the States of New Jersey and New York. Under this legislation, the Port Authority

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maintains the General Reserve Fund at 10% of the par value of all outstanding bonds secured by that Fund, including Consolidated Bonds, which were issued in order to raise moneys to finance or refinance Port Authority facilities.

13. See paragraph 9 for an explanation of this item.

14. The Bonded Debt Service for the next two years equals $233,026.

8. The following chart shows the total reserves of the Port Authority as of December 31, 1973:

Amounts required in 1974 and 1975 for interest and amortization of bonded debt	$233,026,000
Reserves at year end 1973 in excess of 1974 and 1975 bonded debt interest and amortization	3,738,000
Total reserves as of December 31, 1973	$236,764,000

9. As noted in Reference 12 to the chart in paragraph 7 above, the Port Authority maintains the General Reserve Fund at 10% of the par value of all outstanding bonds secured by that Fund including Consolidated Bonds, which were issued in order to raise moneys to finance or refinance Port Authority facilities. In addition, it has been the Port Authority's consistent practice since 1948 to maintain in reserve an amount equal to the next two years bonded debt service, which includes interest and amortization. This practice has been publicly disclosed in the Port Authority's Annual Statements (see page 58 of the 1961 Annual Report, page 68 of the 1962 Annual Report and page 58 of the 1973

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Annual Report) and was discussed by Dwight R. G. Palmer, New Jersey State Highway Commissioner, in his testimony before the Farley Committee. Mr. Palmer stated that the maintenance of this policy "strengthened [the Port Authority's] credit position" and "such reserves [the two year debt and General Reserve Fund] cannot be regarded as uncommitted funds". According to the 1971 Annual Report of the Port Authority, the Bonded Debt requirements for 1972 and 1973 totalled $189,028,000. According to the 1973 Annual Report, revenues in 1972 and 1973 were charged with a total of $152,124,000. The balance of the debt service was attributable to construction in progress and capitalized by the Port Authority.

VII. Port Authority Bonds

1. From 1969 through the end of 1973, the Port Authority obtained the funds necessary for construction of its various projects from the following sources: long-term debt (Consolidated Bonds)—$700 million; medium-term debt (6 or 7 year bank loans)—$260 million; short-term debt (1-year notes)—$290 million, all but $15 million of which was refunded in medium or long-term debt; appropriations from reserves—$61 million. The Port Authority has not issued Consolidated Bonds since October 1973, although it has continued construction work on its various projects. (Stip. 324-327) • • •

3. On October 9, 1952, the Port Authority adopted a Consolidated Bond Resolution, authorizing and establishing an issue of Consolidated Bonds "to serve as a unified medium for financing for any and all purposes for which

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the Authority is or shall be authorized to issue bonds secured by a pledge of the General Reserve Fund." The text of this resolution appears as Appendix V to the Official Statement (Exhibit II) issued in October 1973 with respect to the Forty-first Series of Consolidated Bonds, the most recent series of such bonds. Section 3 of the Consolidated Bond Resolution of October 9, 1952 prohibits the issuance of new Consolidated Bonds unless the one year net revenues of all of the Port Authority's facilities amount to 1.3 times the prospective debt service for the calendar year during which the debt service of all outstanding and proposed new bonds secured by a pledge of the General Reserve Fund would be at a maximum. Section 4 of the October 9, 1952 Consolidated Bond Resolution provided that the net revenues of all Port Authority facilities were pledged to the payment of the debt service of Consolidated Bonds subject to the pledges and liens existing with respect to the General and Refunding Bonds, Air Terminal Bonds and Marine Terminal Bonds. Section 6 of the October 9, 1952 Consolidated Bond Resolution provided that the payment of debt service upon all Consolidated Bonds "shall be further secured equally and ratably by the General Reserve Fund." Moneys in the General Reserve Fund were not to be used for any purpose if there were other moneys of the Port Authority available for that purpose, unless there were sufficient funds available to the General Reserve Fund to pay debt service upon outstanding bonds during the ensuing 24 months, in which event such excess moneys could be used for any purpose permissible under the General Reserve Fund statutes, whether or not other moneys were available for that purpose. Section 7 of the October 9, 1952 Consolidated Bond Resolution established

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a Consolidated Bond Reserve Fund into which all net revenues pledged as security for Consolidated Bonds (after payment of debt service on all Consolidated Bonds and of amounts necessary to bring the General Reserve Fund to its statutory level) were required to be paid. The moneys of the Consolidated Bond Reserve Fund could be used only for the payment of: Consolidated Bonds at maturity, retirement or redemption; debt service upon outstanding Consolidated Bonds; the deficit of any facility the net revenues of which were pledged as security for Consolidated Bonds; and "any other additional purposes for which the Authority is now or may hereafter be authorized by law to expend the revenues of its facilities." (Stip. 327-329) • • •

5. Outstanding Consolidated Bonds as of December 31, 1973 were as follows:

Series	Interest and Maturity	December 31, 1973 (000 Omitted)
First Series	3% due 1982	14,077
Second Series	2¾% due 1984	14,960
Fourth Series	2¾% due 1985	21,000
Fifth Series	2.90% due 1983	12,300
Sixth Series	3% due 1986	19,800
Seventh Series	3.40% due 1986	16,900
Eighth Series	3.40% due 1987	35,000
Ninth Series	3½% due 1973-1975	2,700
Tenth Series	3¾% due 1985	24,000
Eleventh Series	3% due 1973-1978	10,000
Twelfth Series	3⅜% due 1988	30,030
Thirteenth Series	Various due 1973-1978	6,250
Fourteenth Series	3⅝% due 1989	42,845

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Series	Interest and Maturity	December 31, 1973 (000 Omitted)
Fifteenth Series	Various due 1973-1979	10,500
Sixteenth Series	4¼% due 1989	19,475
Seventeenth Series	Various due 1973-1980	10,500
Eighteenth Series	Various due 1973-1981	16,450
Nineteenth Series	3½% due 1991	20,500
Twentieth Series	3¼% due 1993	31,500
Twenty-First Series	3.40% due 1993	22,500
Twenty-Second Series	3⅜% due 1993	22,500
Twenty-Third Series	3⅜% due 1994	23,000
Twenty-Fourth Series	3½% due 1994	23,000
Twenty-Fifth Series	Various due 1973-1984	16,500
Twenty-Sixth Series	3½% due 1995	33,250
Twenty-Seventh Series	3⅜% due 1995	24,500
Twenty-Eight Series	3⅜% due 1996	24,625
Twenty-Ninth Series	3½% due 1996	24,625
Thirtieth Series	3⅝% due 1998	24,500
Thirty-First Series	4% due 2002	99,500
Thirty-Second Series	5% due 2003	100,000
Thirty-Third Series	4¾% due 2003	100,000
Thirty-Fourth Series	5½% due 2003	100,000
Thirty-Fifth Series	6⅝% due 2005	100,000
Thirty-Sixth Series	6.40% due 2005	50,000
Thirty-Seventh Series	6% due 2006	100,000
Thirty-Eighth Series	5⅜% due 2006	100,000
Thirty-Ninth Series	5.80% due 2007	150,000
Fortieth Series	6% due 2008	100,000
Forty-First Series	5½% due 2008	100,000
		$1,697,286

(Stip. 329-330) * * *

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6. * * * The following language appeared in each Official Statement as distributed in connection with the sale of Consolidated Bonds from the time of adoption of the covenant through the Thirty-ninth Series Statement:

> "In connection with the legislation which authorized the Port Authority to assume responsibility for the Hudson Tubes system, the Port Authority had advised the Legislatures of both States that the credit of the Port Authority would be impaired by such an undertaking of an anticipated perpetual deficit facility unless the States would enter into an enforceable contract with the Port Authority bondholders which would grant assurances against dilution of already pledged revenues and reserves by any additional passenger rail deficits beyond those of the basic Hudson Tubes system. The legislation as finally adopted includes such statutory covenants. The covenants are between the two States and with the holders of certain described "affected" bonds which include all Consolidated Bonds including those of the present offering. The contract prohibits the application of any revenues or reserves pledged to such bonds (which includes all existing revenues, other than rentals under the New York State's Commuter Railroad Car Program described on pp. 18-19, and all existing reserves) for any additional passenger railroad purpose beyond the basic Hudson Tubes, as defined, without the consent of the holders of such affected bonds as provided in their contract with the Authority unless the Port Authority shall have first certified the eligibility of such additional railroad, whether it be a Hudson Tubes extension, as defined,

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or new railroad facility. To be eligible the Port Authority must determine either that the proposed additional passenger railroad facility is self-supporting or, if not, that at the end of the preceding calendar year the General Reserve Fund contained the full statutory amount and that for the ensuing ten years the estimated average annual deficits from the proposed additional passenger railroad facility and any then existing Port Authority passenger railroad facility (including the basic Hudson Tubes) would not in the aggregate exceed an amount equal to one-tenth of the amount in the General Reserve Fund at the prior year end. Certain adjustments to this figure are provided by the statute. For example, the amount equal to one-tenth of the General Reserve Fund is to be diminished by an amount equal to 1% of the principal amount of Port Authority bonds the proceeds of which shall have been applied for passenger railroad purposes; this prevents the enlargement of deficit capacity by bonds issued in connection with a deficit passenger railroad facility. Furthermore, if at some time in the future the adjusted 10% of the General Reserve Fund should be exceeded by an amount equal to 1% of the Port Authority's equity, as defined in the statutes, augmented by 1/10 of that adjusted 10%, then the augmented 1% of equity may be used as the limiting figure instead of the percentage of the General Reserve Fund. Also, the limiting figure may be enlarged to the extent of State subsidies for passenger railroad purposes. Section 6 of the 1962 legislation (see Appendix III) should be studied for the exact terms of the statutory covenant."

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The Fortieth and Forty-first Series Official Statements noted that the above statement *"does not apply to bonds of the present offering"* and also included the following language:

> "The statutory covenant against dilution of pledged revenues and reserves by additional passenger railroad facilities, which is discussed in the paragraph quoted above, remains in effect with respect to affected bonds, and remains binding on the Authority although it does not apply to the bonds of the present offering. The legislation which authorized the Port Authority to assume responsibility for the Hudson Tubes system was amended, effective May 10, 1973, by the States of New York and New Jersey (Ch. 1003, Laws of New York 1972, Ch. 318, Laws of New York 1973; Ch. 208, Laws of New Jersey 1972). The New Jersey amendment, when introduced in the New Jersey Assembly, was accompanied by a statement that the bill was intended to preclude the application of the covenant to holders of bonds newly issued after its effective date, while maintaining in status quo the rights of the holders of the bonds issued after March 27, 1962 (the effective date of the covenant legislation) but prior to the effective date of the amendment."

"In a report to the Port Authority, dated December 8, 1971, The First Boston Corporation stated:

'We have been advised by our counsel Mudge Rose Guthrie & Alexander, that the '1962 Covenant' is legally binding. This covenant prohibits the application of Port Authority moneys for any 'railroad

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purposes' other than 'permitted purposes'; these 'permitted purposes' do not encompass additional passenger rail transportation projects except insofar as they are self-supporting or incur an aggregate annual deficit of less than 10% of the Port Authority's General Reserve Fund (which limitation, based on Port Authority reports, has already been exceeded by the Path operation). This precludes general credit financing of any passenger transportation project, no matter how desirable, for which projections show an operating profit below debt service requirements.

"The First Boston Corporation further stated that it considered:

'the financing (through the medium of Consolidated Bonds) of certain peripheral railroad facilities as 'adjuncts', that is, as projects which are integral to airport operation, and which serve the airport only, not commuters generally. However, such 'adjuncts' would need the benefit of a conclusive legal holding to the effect that they constitute part of an existing facility; presumably the nature of the 'adjunct' would determine the distance outside the airport boundaries that it might extend and still be legally treated as an 'adjunct' for financial purposes.'

"Should this 'adjunct' theory prevail with respect to the rail access projects to John F. Kennedy and Newark International Airports, and should the projects be authorized on such basis, it would be unnecessary for the Port Authority to certify the projects as self-supporting under the 1962 statutory covenant described above." (Stip. 330-333) • • •

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7. The Port Authority has stated in the Official Statements covering the issuance of its Consolidated Bonds (for example, page 22 of the Official Statement for the Forty-first Series of Consolidated Bonds):

> "it is the present intention of the Authority that Consolidated Bonds will be the only bonds secured by a pledge of the General Reserve Fund that will be used as a medium of financing the balance of its capital requirements or long-term refunding of outstanding bonds or of Consolidated Bonds hereafter issued."

8. Section 7 of the resolutions establishing each series of Consolidated Bonds prohibits the issuance of any Consolidated Bonds or other bonds to be secured by a pledge of the General Reserve Fund with respect to any facility or group of facilities with respect to which the Authority has not previously issued bonds unless:

> "the Authority shall certify at the time of issuance its opinion that the issuance of such Consolidated Bonds or that such pledge of the General Reserve Fund as security for such bonds other than Consolidated Bonds will not, during the ensuing ten years or during the longest term of any of such bonds proposed to be issued (whether or not Consolidated Bonds), whichever shall be longer, in the light of its estimated expenditures in connection with such additional facility or such group of additional facilities, materially impair the sound credit standing of the Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds." (Stip. 336) • • •

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11. The two principal bond rating agencies, Moody's and Standard & Poor's, have commented on the 1962 Covenant and the effects of its elimination. The Moody's Report dated October 5, 1973, rating the Bonds in connection with the imminent sale of the Forty-first Series, stated in part:

"Rating: Consolidated Bonds: A

"Summary: Despite the clouded future surrounding the World Trade Center and the role, if any, which Port Authority will play in a regional mass transportation system, the Authority's financial position remains strong. Financial strength continues to accrue from the Authority's monopoly on Hudson River crossings and operations at the three important commercial airports in the New York metropolitan area.

"Although bonds of this and the previous issue are not subject to the 1962 statutory covenant barring application of Authority funds to additional deficit passenger railroad operations, the covenant remains in effect as long as any bonds issued under the legislation remain outstanding. As of December 31, 1972 the Authority had outstanding $1,175,500,000 from 20 series of Consolidated bonds issued under the covenant, the last of which is due in 2007. A suit now in the Supreme Court of New York State seeks to permit unlimited application of surplus Authority funds to deficit passenger railroads. If the suit is successful, demands for mass transportation would probably obstruct further Authority expansion into other fields. Bondholder protection would remain

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adequate because debt service constitutes a first lien on net revenues.

• • •

"Structure: This issue of Consolidated Bonds is due in 2008. . . .

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"Mass Transportation: All Authority bonds issued between March 27, 1962 and May 10, 1973 are subject to a statutory covenant against dilution of revenues pledged to the bonds. The legislation prohibits application of all revenues (other than rentals under the New York State commuter railroad car program) and all reserve for any additional passenger railroad purpose beyond the basic Hudson Tubes without consent of bondholders unless the Authority certifies 1) that the proposed facility will be self-supporting, including grants from governments, or 2) that the General Reserve contained the required amount at prior year-end, and that annual deficits from existing and proposed passenger rail facilities would not exceed 1/10 of the amount in the General Reserve Fund at the prior year-end. Although it does not apply to bonds of the Fourtieth and Forty-First Series, the restrictive covenant remains in effect as long as any bonds issued under that legislation are outstanding. As of December 31, 1972 the Authority had outstanding $1,175,500,000 from 20 series of Consolidated bonds issued under this covenant. The final issue under this legislation was the Thirty-ninth Series, which is due in the year 2007.

"The statutes which authorize rail access to Kennedy International Airport and Newark Interna-

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tional Airport revised the definition of 'air terminals' to include mass transportation facilities between the air terminals and other points in the Port District. Hawkins, Delafield & Wood, Bond Counsel for the Authority, is of the opinion that unless such a project were to meet the requirements against dilution of pledged revenues, any financing of such a project by the Authority would be violation of the statutory covenant.

"A suit currently in the New York State Supreme Court, challenges the constitutionality of the statutory covenant and seeks to permit unlimited application of surplus Authority funds to deficit passenger rail operations. If the suit is successful, the demands for mass transportation would probably obstruct further Authority expansion into other fields. Bondholder protection would remain adequate, because debt service constitutes a first lien on net revenues.

"Legislation in 1962 authorized the Authority to undertake a project consisting of a World Trade Center and the Hudson Tubes. The Authority estimated that operations of the Hudson Tubes, including debt service and depreciation, will involve an increasing annual deficit of more than $20 million. Depreciation, which in recent years has been excluded from public-transit-system accounting, was estimated by the Authority at $6 million in 1972.

"In June 1973 Port Authority Commissioners from New York and New Jersey approved and PATH (Port Authority Trans-Hudson Corp.) adopted a

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fare increase from 30¢ to 50¢, but the Interstate Commerce Commission would not grant the increase without further hearings, which were scheduled to begin September 24, 1973. On September 21, 1973 the New York Commissioners, led by Governor Rockefeller, suggested that the fare increase be increased to only 35¢. On September 24, 1973 the hearings were closed after PATH requested an adjournment. On September 28, 1973 PATH filed a petition to reopen the hearings on the fare increase as adopted in June."

The Moody's Report dated October 15, 1973 stated in part:

"Summary: Despite the clouded future surrounding the World Trade Center and the role, if any, which Port Authority will play in a regional mass transportation system, the Authority's financial position remains strong. Financial strength continues to accrue from the Authority's monopoly on Hudson River crossings and operations at the three important commercial airports in the New York metropolitan area.

"Although the two series of Consolidated bonds issued in 1973 are not subject to the 1962 statutory covenant barring application of Authority funds to additional deficit passenger railroad operations, the covenant remains in effect as long as any bonds issued under the legislation remain outstanding. As of December 31, 1972 the Authority had outstanding $1,175,500,000 from 20 series of Consolidated bonds issued under the covenant, the last of which

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is due in 2007. A suit now in the Supreme Court of New York State seeks to permit unlimited application of surplus Authority funds to deficit passenger railroads. If the suit is successful, demands for mass transportation would probably obstruct further Authority expansion into other fields. Bondholder protection would remain adequate, because debt service constitutes a first lien on net revenues.

"Hudson Tubes Facility: The Authority estimates that operations of the Hudson Tubes, including debt service and depreciation, will involve an increasing annual deficit of more than $20 million. Depreciation, which in recent years has been excluded from public-transit-system accounting, was estimated by the Authority at $6 million in 1972.

"In June 1973 Port Authority Commissioners from New York and New Jersey approved and PATH (Port Authority Trans-Hudson Corp.) adopted a fare increase from 30¢ to 50¢, but the Interstate Commerce Commission would not grant the increase without further hearings, which were scheduled to begin September 24, 1973. On September 21, 1973, the New York Commissioners, led by Governor Rockefeller, suggested that the fare be increased to only 35¢. On September 24, 1973 the hearings were closed after PATH requested an adjournment. On September 28, 1973 PATH filed a petition to reopen the hearings on the fare increase as adopted in June. The petition seeking a fare increase to 50¢ was rejected by the ICC on October 10, 1973, and a request for further hearings on the subject was denied.

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"Additional Passenger Railroad Facilities: All Authority bonds issued between March 27, 1962 and May 10, 1973 are subject to a statutory covenant against dilution of revenues pledged to the bonds. The legislation prohibits application of all revenues (other than rentals under the New York State commuter railroad car program) and all reserves for any additional passenger railroad purpose beyond the basic Hudson Tubes without consent of bondholders unless the Authority certifies 1) that the proposed facility will be self-supporting, including grants from governments, or 2) that the General Reserve contained the required amount at prior year-end, and that annual deficits from existing and proposed passenger rail facilities would not exceed 1/10 of the amount in the General Reserve Fund at the prior year-end. Although it does not apply to bonds of the Fortieth and Forty-first Series, the restrictive covenant remains in effect as long as any bonds issued under that legislation are outstanding. As of December 31, 1972 the Authority had outstanding $1,175,500,000 from 20 series of Consolidated bonds issued under this covenant. The final issue under this legislation was the Thirty-ninth Series, which is due in the year 2007.

"The statutes which authorize rail access to Kennedy International Airport and Newark International Airport revised the definition of 'air terminals' to include mass transportation facilities between the air terminals and other points in the Port District. Hawkins, Delafield & Wood, Bond Counsel for the Authority, is of the opinion that unless such a proj-

ect were to meet the requirements against dilution of pledged revenues, any financing of such a project by the Authority would be violation of the statutory covenant.

"A suit currently in the New York State Supreme Court, challenges the constitutionality of the statutory covenant and seeks to permit unlimited application of surplus Authority funds to deficit passenger rail operations. If the suit is successful, the demands for mass transportation would probably obstruct further Authority expansion into other fields. Bondholder protection would remain adequate, because debt service constitutes a first lien on net revenues.

"The proposal for additional passenger railroad facilities was intended to provide for 1) PATH rail link connecting Newark International Airport and Penn Station in Newark 2) extension of PATH into Union County to Plainfield via Newark International Airport 3) direct rail service to Penn Station in Manhattan for Erie Lackawanna riders including equipment yard in Secaucus and a new Hackensack River Bridge. Total capital costs were estimated at $650 million. The Authority has stated that the project could be effectuated on a self-supporting basis if governmental funds of $400 million were contributed to construction funds."

"Operations: Operating data for 1972 show moderate increases in traffic on the Authority's toll bridges and tunnels, a small increase in plane movements with a substantial rise in airport passengers

(due to use of larger planes with greater capacities), and large increases in ship arrivals and waterborne cargo. Marine terminal operations reflect recovery from the East Coast dock strike in 1971. Financial operations improved considerably in 1972. Net revenues rose 12.4% compared to a decrease of 1.2% in 1971. Gross operating revenue rose 14.2% compared to 9.6% in 1971. Operating and maintenance expenses grew only 13.6%, down substantially from the 20.9% growth rate in 1971, and in line with growth in revenues."

The Moody's Report dated November 1, 1973 stated in part:

"ADDENDUM

"Our sale report and review report on this unit, dated October 5, 1973 and October 15, 1973 respectively, cited a suit filed in the Supreme Court of New York State, challenging the constitutionality of 1962 legislation which prohibits application of virtually all Authority revenues and reserves to any additional deficit passenger railroad operations beyond the basic Hudson Tubes. It should be noted that if the 1962 legislation is held to be unconstitutional, Authority funds will not *automatically* become available for additional passenger railways. Such a procedure can only be established through bi-state legislation."

The Standard & Poor's Report dated June 16, 1973, rating the Bonds in connection with the imminent sale of the Fortieth Series, stated in part:

"$100,000,000 Bonds Rated A"

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"The Authority covenants to establish charges in connection with its facilities so that the net revenues pledged to the Consolidated Bonds or the surplus revenues from those facilities which are payable into the General Reserve Fund will be at least sufficient to provide for debt service on Consolidated Bonds. Additional parity bonds may be issued if, in general, net revenues for any 12 consecutive months out of the previous 36 months, adjusted to reflect estimated net revenues (not exceeding 25% of the 12 months' historical net revenues) to be derived from uncompleted or recently completed facilities, are equal to 1.3 times maximum annual debt service on all Consolidated Bonds to be outstanding. It is also required (by Section 7 of the Fortieth Series bond resolution, as well as by previous Series' resolutions) that the Port Authority, relative to the financing of any additional facility for the first time by Consolidated Bonds or other bonds sharing in the pledge of the General Reserve Fund, must first certify its opinion that such issuances will not thereby, during the ensuing ten years or during the longest term of the bonds, proposed to be issued, whichever would be longer, materially impair the sound credit standing of the Authority or the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments, including its undertaking to the holders of Consolidated Bonds.

"The 1962 legislation authorizing the Port Authority to acquire the Hudson Tubes and construct the World Trade Center contained a statutory covenant limiting the Port Authority's financial participation

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in additional deficit railroad facilities beyond those of the Hudson Tubes. In essence, the 1962 covenant prohibits the application of any revenues or reserves pledged to Consolidated Bonds for any additional passenger railroad purposes beyond the basic Hudson Tubes without bondholder approval unless the Port Authority and the Governors of New York and New Jersey shall certify that the proposed additional passenger railroad facility is self-supporting or, if not, that the General Reserve Fund contains its full statutory amount and that for the ensuing ten years the estimated average annual deficits from the proposed additional passenger Railroad facility and any then existing Port Authority passenger railroad facility (including the basic Hudson Tubes) would not in the aggregate exceed an amount equal to 1/10 of the amount in the General Reserve Fund at the prior year end. Certain adjustments are provided by the statute: the amount equal to 1/10 of the General Reserve Fund is to be diminished by an amount equal to 1% of Port Authority bonds the proceeds of which shall have been applied for passenger railroad purposes. This certification relates only to the Port Authority's own investment in the particular facility.

"Considerable controversy has surrounded the Port Authority's involvement in mass transit, and, in particular, the 1962 Covenant outlined above. Since the PATH deficit has been growing steadily and currently is estimated to be in excess of $20-million annually, there is obviously no room within the 1962 Covenant restrictions for the Authority to

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take on additional deficit rail transit operations. During 1971-73 several amendments to earlier statutes, including the 1962 legislation, were passed by the Legislatures of New York and New Jersey. These amendments authorized the Authority to provide mass transportation facilities connecting with Kennedy and Newark Airports: to extend the Hudson Tubes from Newark to Plainfield, and to undertake a series of New Jersey rail improvements with respect to direct Erie-Lackawanna and Penn Central railroad service into Pennsylvania Station in New York City; and provided that the provisions of the 1962 Covenant which limits the Port Authority's financial participation in additional deficit railroad facilities shall not apply to Port Authority obligations issued after May 10, 1973. Thus, the 1962 Covenant remains in effect with respect to all bonds previously issued (which have a maximum maturity in 2007) and remains binding on the Authority so long as those bonds remain outstanding. From a practical point of view, all Consolidated Bonds, including the present Fortieth Series, will continue to enjoy the protection of the 1962 Covenant until all bonds issued prior to May 10, 1973, shall have been retired.

"The legislation authorizing rail access to Kennedy and Newark airports amended the definition of 'air terminals' to provide that: 'It shall mean facilities providing access to an air terminal, consisting of rail, rapid transit or other forms of mass transportation. . . .' There appears to be some question as to the legal necessity for the Port

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Authority to certify these particular projects as self-supporting. However, in connection with the present Fortieth Series Bonds, the Port Authority states: 'It is presently intended that passenger railroad facilities authorized by that legislation be effectuated on a self-supporting basis, including substantial amounts of governmental financial aid. Additional railroad facilities which meet the test of self-support would be permitted purposes under the 1962 covenant legislation.'

"The Port Authority has experienced a steady record of increasing operating revenues over the years, gross operating revenues growing from $154-million in 1963 to $320-million in 1972. With the exception of 1971, when there was a slight decline, net revenues available for debt service have shown a similar strong growth, increasing from $79-million in 1963 to $140-million in 1972. In all years interest and mandatory long term debt retirements have been covered in excess of two times by available net revenues. The $140-million available net revenues for 1972 would cover estimated maximum annual debt service ($112,478,000 in 1986) on all Consolidated Bonds to be outstanding 1.25 times. Debt service declines sharply thereafter. The improvement in net revenues from $125-million in 1971 to $140-million in 1972 was the largest in at least the last ten years and has been obtained despite an increasing annual PATH operating deficit. Significant additional revenues could undoubtedly be produced, if needed, through modest increases in tolls and other charges for use of Port Authority facilities.

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"Despite efforts to involve the Port Authority more deeply in mass transit, and despite statements relative to the Authority's participation of $250-$300 million out of a total of $650-million Federal, State and Authority funds for the recently authorized rail transit improvements, it is apparent that present legislation does not permit such employment of Authority funds without safeguards. It appears that present legislation does not open a 'Pandora's box' of unknown adventures in the field of deficit mass transit operations, but does, in practice, continue to provide support for the credit standing of the Port Authority's bonds by restricting the extent to which the Port Authority can become involved with deficit rail facilities. Undoubtedly, future efforts will be made to 'tap-the-till' of the Port Authority to finance mass transit facilities in the New York metropolitan area, and such efforts should be carefully watched as to their potential impact upon the quality of the revenues pledged to service the Authority's bonds. It should be recognized that the ability of the Port Authority to accomplish what it has in the development of facilities vital to the metropolitan New York and New Jersey region has been in great measure dependent upon the Authority's ability to borrow the required capital funds. Such ability to borrow at favorable interest rates depends upon the Authority's credit standing in the financial community and efforts which would diminish this credit standing, such as the move in 1972 by the New York legislature to retroactively repeal the 1962 Covenant, should be carefully weighed by all concerned.

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"In the meantime, we are continuing our 'A' rating on the Port Authority's Consolidated Bonds, including the present Fortieth Series, based upon the Authority's strong operating, financial and management record, the prospects for a continuation of this record, and the protection afforded by current legislation from unforeseen dilution of pledged revenues and reserves by unrestricted involvement in deficit mass transit operations."

The October 6, 1973 Standard & Poor's Report stated: "On October 9th. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY plans to sell at competitive bidding $100,000,000 Consolidated Bonds, Forty-first Series, Due 2008 (First Installment). The bonds will be secured equally and ratably with outstanding Consolidated Bonds. On June 20, 1973, the Port Authority sold $100,000,000 Consolidated Bonds, Fortieth Series, which was discussed at length in the Fixed Income Investor of June 16, 1973, beginning on page 754. We are maintaining our 'A' rating."

12. On April 30, 1974 Governor Byrne of New Jersey signed into law an Act of the New Jersey Legislature (1974 Laws of New Jersey Ch. 25) repealing Section 3 of the 1972 law, quoted at page 256. Concurring legislation was signed into law by Governor Wilson of New York on June 15, 1974 (1974 Laws of New York Ch. 993).* The New York Legislation prompted the following discussion:

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* The bill was introduced on February 15, 1974. The repealing legislation was enacted by both States without amendment, legislative fact-finding at the 1974 Session, extensive contemporary legislative debate, public hearing or committee reports. Part III of this Stipulation discusses the legislative history of the enactment of the 1962 Covenant and of the proposals in 1971, 1972 and 1973 to repeal the Covenant.

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"THE CLERK: Senate Bill 10607, Rules Report No. 364, Caemmerer. An Act to repeal section two of chapter one thousand three of the laws of nineteen hundred seventy-two, entitled 'An Act to amend chapter two hundred nine of the laws of nineteen hundred sixty-two, entitled "An Act to provide for the financing and effectuation by the port of New York authority of a port development project, consisting of the Hudson tubes, the Hudson tubes extensions and a world trade center, for coordinating, facilitating and promoting the transportation of persons and the flow and exchange of trade and commerce in and through the port of New York district, and agreeing with the state of New Jersey with respect thereto", in relation to the application of rentals, tolls, fares, fees, charges, revenues or reserves of the port authority,' relating to the application of certain changes effected thereby."

"MR. KOPPELL: Mr. Speaker, this is a piece of legislation which has been discussed on this floor in various forms for three years, now, and with the passage by this House and hopefully the signature of the Governor, the State of New York and New Jersey will have repealed a covenant which has prevented the use of any Port Authority funds for rail mass transportation purposes in the Port Authority district which embraces the state or portions of the state of New York and New Jersey. I and many others have been fighting since 1971 to see that these covenants are taken out of the Bond Issues to which they are addressed. I want to make clear to this House and to the record a number of things, and for

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that purpose I would like to address questions to Mr. Farrel who is the sponsor in this House. Would Mr. Farrell yield?"

"ACTING SPEAKING FIELD: The gentlemen yields."

"MR. KOPPELL: Mr. Farrell, I am right I presume, and we can say for the record, can we not, that this House is passing this legislation today because of urgent need for additional funds for mass transportation purposes, rail transportation purposes, in the Port Authority district?"

"MR. FARRELL: That is correct, Ollie."

"MR. KOPPELL: And, George, is it not also true that because of the fact that the 1972 Bond Issue was not approved by the people and because the state has already extended itself in providing over $100 million to mass transportation that it is unlikely that at this time we can see a further contribution or at least a further major contribution of mass transportation from any other source than the Port Authority?"

"MR. FARRELL: Well, Ollie, that is correct. As you know, we have already approved in this session a much more modified mass transit bond issue in the sum of $250 million which will be presented to the people this November,* and we all recognize that although hopefully if it is approved it will certainly be a great stimulus in terms of capital improvement

* This bond issue was adopted by the voters of New York in November, 1974 [footnote added by stipulation].

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and development with respect to mass transit, there is no question but that the overall demands of the state areas with respect to mass transportation would never be satisfied out of that Bond Issue. As a result, the ability of the Port Authority to become more intimately involved, to become more directly involved and more quickly involved in mass transit would serve to assist us with respect to on-going programs that we have in New York, that are still to be completed out of the 1967 Bond Issue although those monies have all been committed to specific projects, and also to allow our existing systems operated under M.T.A., to be concerned with those facilities that presently exist with the Port Authority, hopefully development of lines between Penn Station and Kennedy Airport. The passage of this legislation—as you know it has already passed both Houses of the Jersey Legislature and has been signed by Governor Byrne—passage of this legislation and the approval of it by the Governor could put us directly on the road towards a greater development of mass transit in the metropolitan area of New York-New Jersey."

"MR. KOPPELL: And I agree with that, George, and would you not also say that whatever the judgment of the 1961 and 1962 Legislature may have been, it is the judgment of this Legislature that Port Authority must play a role in the development you spoke of?"

"MR. FARRELL: Yes. Well, Ollie, I think it is safer to assume although neither one of us who were here

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—as a matter of fact there are very few members who are here right now who were present in this Chamber in 1962—but at that time the urgency of mass transportation in terms of the total complexion of problems relating to transportation, had not peaked to the point that it has today in 1974, and as a result it may have been the sense of the Legislatures of New Jersey and New York at that time, but there wasn't the type of urgency that exists as it does today in 1974, and so basically what we are saying is that we are not being critical of the 1962 Legislatures of New York and New Jersey for what they have done but we are trying to say to the people and to the courts and to the bond holders and to all of us who are concerned about the bi-state area that today, 1974, mass transit must be the most important factor in the overall problem of transportation and not rubber and not concrete, and for that reason I think that what we are doing is consonant with everything else that we have done with the 1967 Bond Issue which addressed itself to the first bond sold directly to mass transportation, to the attempt that was made in 1973 for approval of the people for another bond issue in that area, and here again in 1974 with the presentation to the people of another bond issue in the amount of $250 million the establishment for the first time in the history of this state of a real preservation act which goes to the problem of abandoned railroads in upstate New York particularly, and revitalization of freight service, that we are in a new era. The Legislature has addressed itself to that era and this is just one

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further step in addressing ourselves to a very critical problem in the hopes that monies that are available to the Port Authority can be funneled in that direction."

"MR. KOPPELL: One last question, George. You would agree I take it with Governor Rockefeller's assessment that this step of repealing these so-called covenants will not affect the security of the bond holders in their investment nor impair the ability of the Port Authority to pay when they are due installments of interest and principal."

"MR. FARRELL: Well, let me just say this, Ollie, that I don't preceive of a situation occurring in which any one holding a Port Authority Bond because of the backing that the Port Authority has received from both states, the State of New York and New Jersey, they should feel in any sense of the term that the responsibility for the payment of those bonds is in jeopardy. However, I must say to you in all fairness, Ollie, because there have been statements made by Governor Wilson, not in opposition to what we are doing here today but simply to point out something which in his mind poses a potential problem. I must say to you, Ollie, that, ladies and gentlemen of the House, that this is not something that Governor Wilson has an opinion and for which no one else shares in that opinion and concern. The concern has been expressed presently and in the past by Comptroller Levitt, and by the Attorney General of our state, but I don't think that is the point that we are discussing here today. I do not doubt that

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there will be litigation with respect to this very issue, and I submit to you that there may be some very difficult questions of law that will be presented to the courts as it relates to bonds that were issued prior to 1973 because, as everyone here knows, because of legislation passed last year in connection with the county ruling, any further bonds issued by the Port Authority will not contain the covenant, but I think the real point here is that there was a change in attitude, not just in the Legislature of both states between 1962 and 1974 but there has been a very real change in the dimension of the problems of moving people and goods both in New York and New Jersey, and that we are dealing here with a question not only of good faith. We are also dealing with the question of priorities and what may have been legislative priorities in 1962 simply are not those priorities in 1974, and it is my hope and my belief at this time, although certainly I do not profess to be an expert in both federal and state constitutional law, but a case can be made for what we are doing here today, and I would rather assume that risk than to do nothing."

"MR. KOPPELL: Thank you, George. Mr. Speaker."

"ACTING SPEAKER FIELD: Mr. Koppell."

"MR. KOPPELL: I think that Assemblyman Farrell's words are extremely accurate and appropriate to what we are doing here today. As one who has been a leader of this fight now for four years, I regard this as a most significant moment for the development of mass tranportation in the metro-

politan area. Not only does this promise to open up the financial resources of the Port Authority, which many have estimated over or up to $100 million a year in surplus revenues to mass transportation, but it will allow the Port Authority to assume the role which was given to it back in the early 1920's when it was created, and that was as the essential coordinating force for mass transportation through the metropolitan area. That role was written into the original compact passed by the two states and ratified by the Congress of the United States, and I and many others have felt that the 1962 Legislature which we are repealing today went counter to that original compact and was in a sense contrary to the interpretation of its purposes and never really had any role, never really had any place in the statute books of this state and the state of New Jersey. In fact, I as a plaintiff in a lawsuit have argued that the 1962 legislation could never be deemed effective because it was never ratified by Congress and it represented such a radical departure from the intent of Congress in ratifying the original compact between the states, that in order for it to be effective Congress had to act on it and Congress never did. Thank goodness now Congress will never have to act upon it because we are repealing this covenant today should this bill pass, and I want to urge upon Governor Wilson that he sign it expeditiously and that the matter be given to the courts and I am confident that the court will recognize that this Legislature must have the right to provide the kind of funds that are necessary to have an efficient and reasonable in

costs mass transportation system in the region. If anything indicates the necessity of increased funds for mass transporation, it is the energy crisis in which we are involved and which threatens our whole society. I think this legislation is critical. I think this legislation is certainly one of the most important things that we can do today, and is undoubtedly one of the most important steps that we can take to improve mass transportation. I want to commend the sponsors and the leadership of the House for bringing it forth so that finally we can make the Port Authority what it ought to be and we devote the mass resources that that Authority has to solving one of the critical problems we have in our state, that of mass transportation. I urge a unanimous house vote in support of this legislation."

"Mr. Meyer: Mr. Speaker."

"Acting Speaker Field: Mr. Meyer."

"Mr. Meyer: Mr. Speaker, I recall in the winter of 1971 when I came up here as a rookie Assemblyman sitting in the corporations, authorities and commissions committee of this House and seeing another rookie Assemblyman across the table from me from Riverdale, from the Bronx, start to talk about the Port Authority of New York, an agency which I never heard of. Maybe I read about it in the papers a few times. And he kept talking about the idealism of it, kept talking about the need of public transportation in this state. Then I remember him shortly thereafter forge an ad hoc committee because he couldn't get any formal recognition of what he was

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doing from the majority party at that time, holding hearings in New York, holding many meetings, giving some due, needed publicity to this fact, and I just want to say after what I say in 1971, 1972, 1973 and 1974 from Ollie Koppell that I take my hat off to him for what he did."

"MR. STRELZIN: Mr. Speaker."

"ACTING SPEAKER FIELD: Mr. Strelzin."

"MR. STRELZIN: Will Mr. Farrell yield?"

"ACTING SPEAKER FIELD: The member yields."

"MR. STRELZIN: Mr. Farrell, I am under the impression that the New York Port Authority Charter provided that if there was a shortage of funds to make necessary payments to bond holders that money would be supplied by the State of New York on application to the governmental Comptroller. Am I right, sir?"

"MR. FARRELL: Both states."

"ACTING SPEAKER FIELD: Read the last section."

"THE CLERK: This act shall take effect immediately."

"ACTING SPEAKER FIELD: Call the roll. (Roll call.) The bill is passed. (Applause.)"

"MR. STRELZIN: Mr. Speaker."

"ACTING SPEAKER FIELD: Mr. Strelzin."

"MR. STRELZIN: Mr. Speaker, if I might, I was busily engaged in a little discussion but I want to

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pay my compliments to Assemblyman Farrell and Assemblyman Koppell on this legislation we just passed. It has been a long road and I hope that when it goes downstairs the Governor will join with us, but I think it is a step that I know will go a long way towards solving our problems in the metropolitan area, and I hope this problem doesn't spread to the rest of the state."

The statement of sponsors appended to the bill in New Jersey (A1304) provided:

"STATEMENT

This bill is designed to preclude the application of the 1962 covenant restricting port authority participation in mass transit projects. Chapter 208, P.L. 1972, precluded such application to bonds newly issued after the effective date of that act, but maintained in status quo the position of holders of bonds issued between March 27, 1962 and December 28, 1972. Since affected bonds are outstanding until the year 2007, the restrictions imposed by the covenant effectively preclude sufficient port authority participation in the development of a public transportation system in the port district. In 1972 the State of New York passed legislation precluding the application of the 1962 covenant from outstanding bonds as well as newly issued bonds. It is the purpose of this act to accomplish effective repeal of the covenant."

13. United States Trust Company of New York among others tried to persuade Governor Wilson not to sign the

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legislation. Governor Wilson issued the following statement when he signed into law the 1974 New York legislation repealing Section 3 of the 1962 Covenant.

> "Coupled with action taken by the State of New Jersey, this bill retroactively repeals the 1962 statutory covenant entered into between the States of New York and New Jersey and prospective purchasers of bonds of the Port Authority of New York and New Jersey. Pursuant to that covenant, the Port Authority is prohibited from using its revenues beyond the existing Port Authority Trans-Hudson (PATH) System for rail mass transit facilities unless such facilities would be self-supporting.
>
> "It is with great reluctance that I approve a bill that overturns a solemn pledge of the State. I take this extraordinary step only because it will lead to an end of the existing controversy over the validity of the statutory covenant, a controversy that can only have an adverse affect upon the administration and financing of the Port Authority, and because it will lead to a speedy resolution by the courts of the questions and issues concerning the validity of the statutory covenant. Because it is the province of the courts to decide questions of constitutionality, I will not prevent the covenant issue from being brought before them, especially where it is the unanimously expressed desire of the members of both houses of the New York State Legislature as well as the expressed will of the Governor and both houses of the Legislature of the State of New Jersey to do so.

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> "In approving the bill, I note that the Chairman of the Port Authority has advised me that the Authority presently has invested more than $220 million in PATH facilities and has incurred operating deficits for PATH services of approximately $140 million. Moreover, the Authority expects to spend nearly $130 million over the next ten years to complete the renovation of the existing PATH System and an additional $350 million for the PATH rail extensions and high speed rail service to John F. Kennedy International Airport. Thus, the Port Authority is solidly committed to providing mass transportation facilities and services to New Yorkers.
>
> "In response to my inquiry, the Chairman has also advised me that because of the heavy long term capital commitments for the PATH facilities and the Kennedy rail link, the Authority has no significant capacity to contribute funds for operating subsidies for commuter railroads. Hence, the plain and simple fact of the matter appears to be that the Authority has virtually no excess funds that could be channeled into operating subsidies for mass transportation facilities in the New York metropolitan area. Even if such funds were available, existing bond indenture provisions which survive despite repeal of the statutory covenant would prohibit their use except in relation to facilities owned, leased or operated by the Port Authority.
>
> "For these reasons, my approval of the bill should not be considered as a criticism of the efforts which the Port Authority has made to provide effective

transportation services, including mass transportation services, to the people of the New York metropolitan area, nor a panacea for the mass transportation problems plagueing the New York metropolitan area. The bill is approved."

Governor Byrne's office issued the following statement when he signed into law the New Jersey legislation repealing the 1962 Covenant:

"Governor Brendan Byrne Tuesday signed a bill designed to stimulate greater involvement in mass transit projects by the Port Authority of New York and New Jersey.

"The bill, A-1304, sponsored by Assemblyman Herbert C. Klein, D-Passaic, repeals the 1962 covenant which has effectively precluded the port authority from becoming involved in mass transit projects in the New York metropolitan area. The covenant restricts the authority from participation in mass transit projects which are not self-sustaining.

" 'I hope this bill, coupled with the same legislation in New York State, will clear the way once and for all for the port authority to fulfill what I believe was one of its original functions,' said Byrne. 'The authority was created as a transportation agency and I intend to see that it lives up to its original promise of assisting in establishment of a quality public transportation system for the metropolitan region without in any way impairing its fiscal integrity.'

" 'I hope the authority will now join with New York State, New York City and New Jersey in working toward the realization of a viable public transportation for the port district,' he added.

"The Governor said the port authority staff has the experience, expertise and financial capability to perform a valuable function in solving the mass transit dilemma in the metropolitan region.

" 'This bill means that it is the public policy of the state of New Jersey that the port authority—a creation of the states of New Jersey and New York —should become a leader in improving the plight of those who rely on or choose to use mass transit,' he said.

"The Governor said he expects repeal of the covenant to provide new impetus for the proposed PATH (Port Authority Trans-Hudson) extension to Plainfield, as well as for future transit projects in New Jersey.

"Byrne emphasized he intends to do nothing that would adversely affect the authority's financial integrity, particularly its ability to meet its obligations to its bond holders.

" 'The State has as much at stake as the authority in maintaining the sound financial base it has enjoyed,' he said. 'Preserving the authority's outstanding reputation in the financial community can only serve to enable it to become more involved in future public transportation projects.' "

14. On November 12, 1974, the New York Times published the following article:

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"Cahill Defends Port-Unit Stand

"Denies His Transit Backing Caused Fund Problems

"Princeton, Nov. 11—Former Gov. William T. Cahill today defended his efforts to effect a greater involvement of the Port Authority of New York and New Jersey in mass transportation during his term in office.

"Over the weekend, Port Authority officials accused him of having precipitated the agency's current financial problems by attempting to force it into deficit commuter rail operations.

"'When something goes wrong' Mr. Cahill said, 'everybody wants to blame everybody else. When I went in there, nothing was happening. My administration got them involved in mass transportation.'

"Mr. Cahill, who now practices law here, was Governor from January, 1970, until January of this year. He was elected after repeated campaign promises to push the Port Authority into mass transportation.

"The Port Authority's present problems, which stem from a drop in income at various facilities and difficulty in raising money, have nothing to do with administration, Mr. Cahill insisted.

"Lists Roots of Problems

"'Their problems', he said, 'come from four sources—a reduction in revenues because of inflation,

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slackness in the bond market, the action of the two states in repealing the covenant with the bondholders retroactively and the lawsuit stemming from that repeal.'

"The covenant signed in 1962 when the Port Authority took over the commuter line now known as PATH, guaranteed purchasers of the authority's bonds that it would never have to take on another deficit passenger rail service. Both New York and New Jersey repealed the covenant earlier this year and a bondholders' suit was filed soon thereafter.

"Mr. Cahill said he would have vetoed any retroactive repeal during his administration.

"'It's like telling your bondholders that your bonds don't really mean what they say they mean,' he said. 'It's like raising a red flag in the financial community.'

"Mr. Cahill said he never asked the Port Authority to take on any projects that could not have been accomplished under the restrictions of the 1962 covenants.

"The former Governor said he was suspicious of the Port Authority's assertions that it cannot sell bonds.

"'The Sport Authority sold its bonds at 7 per cent with nothing to back them up,' he said. 'Certainly the Port Authority can do as well as that'. The New Jersey Sports and Exposition Authority is constructing a race track and stadium in the Hackensack Meadows.

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"Meadows Rail Link Sought

"Mr. Cahill conceded that there was little physical evidence that the Port Authority was acting on mass-transportation projects he had said they would undertake; an extension of PATH to Plainfield via Newark International Airport, new rail connections in the meadows and the rehabilitation of Penn Station in Newark.

" 'You've got to realize how long these things take,' he said, noting that the PATH extension had been in the planning stages for almost four years."

15. A number of bills were introduced during 1974 in the New Jersey Legislature with respect to the examination and development of various solutions to New Jersey's transportation needs. With one exception (Assembly Joint Resolution 21) none of the bills if adopted in the form introduced would have involved the use of Port Authority funds. None of the bills was reported out of committee. (Stip. 338-361)

• • •

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The foregoing stipulation is hereby agreed to and approved.

Dated: December 20, 1974

MEYNER, LANDIS & VERDON
Gateway I
Newark, New Jersey
/s/ ROBERT B. MEYNER

CARTER, LEDYARD & MILBURN
2 Wall Street
New York, New York 10005
/s/ DEVEREUX MILBURN

WILLIAM F. HYLAND
Attorney General of the State
of New Jersey
Attorney for Defendants

By /s/ MICHAEL I. SOVERN
Michael I. Sovern

/s/ MURRAY J. LAULICHT
Murray J. Laulicht

/s/ HAROLD S. H. EDGAR
Harold Edgar

(Stip. 366)

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APPENDIX V

CONSOLIDATED BOND RESOLUTION
(Adopted October 9, 1952)

WHEREAS, by Chapter 48 of the Laws of New York of 1931, as amended, and Chapter 5 of the Laws of New New Jersey of 1931, as amended, The Port of New York Authority (hereinafter called the Authority) has been authorized and empowered to establish and maintain a certain General Reserve Fund, and to pledge said fund as security for certain of its bonds or other securities or obligations, and

WHEREAS, there are now outstanding several issues of bonds of the Authority, which although secured by said General Reserve Fund, nevertheless differ as to form, security, terms and conditions, and

WHEREAS, the Authority has determined to authorize and establish an issue of Consolidated Bonds, and to use such Bonds (and the proceeds derived from the sale thereof) from time to time for the purpose of refunding bonds heretofore or hereafter issued and to serve as a unified medium for financing for any and all purposes for which the Authority is or shall be authorized to issue bonds secured by a pledge of the General Reserve Fund, to the exclusion of bonds of prior issues.

NOW, THEREFORE, after due consideration had, be it resolved by The Port of New York Authority: (p. 55) • • •

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SECTION 2. Establishment and Issuance.

An issue of bonds of the Authority to be known as "Consolidated Bonds" is hereby authorized and established. The bonds of said issue shall be direct and general obligations of the Authority and the full faith and credit of the Authority are hereby pledged for the prompt payment of the debt service thereon and for the fulfillment of all other undertakings of the Authority assumed by it to or for the benefit of the holders thereof. This resolution shall constitute a contract with the holders of such bonds.

Said Consolidated Bonds shall be issued only for purposes for which at the time of issuance the Authority is authorized by law to issue bonds secured by a pledge of the General Reserve Fund and only in such amounts as are permitted by Section 3 of this resolution. Said Consolidated Bonds shall be secured by revenues of the facilities of the Authority in the manner and to the extent provided in Sections 4 and 5 of this resolution and by the General Reserve Fund of the Authority in the manner and to the extent provided in Section 6 of this resolution and by the Consolidated Bond Reserve Fund in the manner and to the extent provided in Section 7 of this resolution.

Said Consolidated Bonds may be issued from time to time in such series as the Authority may hereafter determine. The bonds of each series may be issued in one or more installments as the Authority may hereafter determine.

All Consolidated Bonds constituting a particular series shall be uniform in respect of (a) dates of payment of interest, (b) place or places of payment of principal and interest, (c) medium of payment, (d) whether issuable as coupon bonds, or as registered bonds without coupons, or both, (e) provisions, if any, in respect of their exchange-

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ability for bonds of different denominations, and of the interchangeability of coupon bonds and registered bonds without coupons, and (f) provisions, if any, for redemption and the terms and conditions thereof, *provided, however,* that bonds constituting a particular series may be made redeemable either in the direct or the inverse order of their maturities if such bonds have differing dates of maturity or by lot. All bonds constituting the whole or a part of a particular series and maturing on the same date shall be uniform in respect of interest rate or rates. All bonds of a series consisting only of bonds having the same date of maturity shall be uniform in respect of provisions, if any, in respect of amortization and retirement of bonds of such series.

Any resolution establishing a series or authorizing the issue of an installment of bonds of a series may contain terms and provisions not inconsistent with this resolution.

SECTION 3. Limitations on Amount.

The Authority shall not issue new Consolidated Bonds at any time unless one or another of the following four conditions shall exist, either • • • or, in the alternate,

> (Condition 3) Unless at the time of issuance of such new Consolidated Bonds the sum of the net revenues specified in the following subdivisions i, ii, iii and iv (computed as hereinafter set forth in this Section 3) in the case of all facilities the surplus revenues of which shall be payable into the General Reserve Fund after the fulfillment of the purposes for which the new Consolidated Bonds are to be issued, to wit:

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> i. In the case of facilities which have been in operation during the entire period of thirty-six months next preceding such time of issuance,—the combined net revenues derived from all such facilities during any period of twelve consecutive months selected by the Authority out of the thirty-six months next preceding such time of issuance, plus
>
> ii. In the case of facilities which have been in operation during the entire period of twelve months but not during the entire period of thirty-six months next preceding such time of issuance,—the net revenues derived from each such facility during any period of twelve consecutive months (which need not necessarily be the same for each such facility) selected by the Authority out of such period of operation, plus
>
> iii. In the case of facilities which have not been in operation during the entire period of twelve months next preceding such time of issuance (including facilities under construction at such time or which are to be acquired, established or constructed with the proceeds of the sale of the new Consolidated Bonds),—the average annual net revenues which the Authority estimates will be derived from each of such facilities during the first thirty-six months after such time of issuance, but if in the opinion of the Authority any such facility will not be placed in operation until after such time of issuance, then as to each such facility, the average annual net revenues which the Authority estimates will be derived during the first thirty-

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six months of operation thereof after such time of issuance; *provided, however,* that no revenues estimated under this subdivision iii shall be included in the sum of all net revenues computed under this Condition 3 unless at the time of issuance of the new Consolidated Bonds there shall be in or available for payment into the General Reserve Fund an amount equal to the full amount prescribed in the General Reserve Fund statutes, calculated without the new Consolidated Bonds; and *provided,* further, that the amounts of any revenues estimated under this subdivision iii plus the amounts of any revenues estimated under the next following subdivision iv shall in no event exceed twenty-five per centum of the sum of all net revenues computed under the preceding subdivisions i and ii of this Condition 3, plus

iv. In the case of each capital improvement to any of such facilities if such capital improvement is either under construction at such time of issuance or has been completed less than twelve months prior to such time or, in case it has not yet been commenced, if the Authority has either issued bonds or has entered into a contract for the issuance of bonds or has authorized the issuance of the new Consolidated Bonds for the financing of all or part of such capital improvement,—the average annual amount which the Authority estimates that the net revenues of the facility to which such improvement appertains will be increased during the first thirty-six months after the completion of such improvement, over and above the amount of

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net revenues included for such facility in the foregoing subdivisions i, ii or iii of this Condition 3; *provided, however,* that no revenues estimated under this subdivision iv shall be included in the sum of all net revenues computed under this Condition 3 unless at the time of issuance of the new Consolidated Bonds there shall be in or available for payment into the General Reserve Fund an amount equal to the full amount prescribed in the General Reserve Fund statutes, calculated without the new Consolidated Bonds; and *provided,* further, that the amount of any revenues, estimated under this subdivision iv plus the amounts of any revenues estimated under the next preceding subdivision iii shall in no event exceed twenty-five per centum of the sum of all net revenues computed under the preceding subdivisions i and ii of this Condition 3,

shall have amounted to at least one and three-tenths times the prospective debt service (computed on the assumptions hereinafter set forth in this Section 3) for the calendar year after such time of issuance for which the combined debt service (so computed) upon the following bonds would be at a maximum, to wit:

i. The new Consolidated Bonds,

ii. All bonds outstanding at such time of issuance which are secured by a pledge of the General Reserve Fund, not including, however, any bonds which the resolution authorizing the issuance of the new Consolidated Bonds shall specifically

designate are to be refunded by the new Consolidated Bonds, and

iii. Additional bonds secured by a pledge of the General Reserve Fund and having annual debt service in amounts estimated by the Authority, if estimated revenues and/or estimated revenue increases in connection with any facility or capital improvement have been included under the next preceding subdivisions iii and/or iv in the computation of the sum of the net revenues under this Condition 3 in connection with the particular new Consolidated Bonds to be issued and if the Authority is of the opinion at the time of issuance of such new Consolidated Bonds that such additional bonds will be issued in connection with such facility or improvement and will be outstanding during the thirty-six months for which the revenues and/or revenue increases have been estimated under said subdivison iii and/or iv;

or, in the alternate, (pp. 57, 59-60)•••

Prospective debt service upon any bonds shall be computed for the purpose of determining the calendar year for which such debt service will be at a maximum and the amount of such debt service for such year, within the meaning of this Section 3, upon the assumptions that the principal amount of such bonds will not be paid prior to maturity except in fulfillment of contractual obligations by the Authority to the holders thereof for the redemption thereof prior to maturity, and that in those cases such redemption will be effected at the latest date permitted by such agreement.

SECTION 4. Pledge of Revenues.

The payment of the debt service upon all Consolidated Bonds, regardless of the series or installment of which they form a part, and regardless of the dates of their issuance or maturity or the purposes for which issued, shall be secured equally and ratably by the net revenues of the Authority from each of the following:

i. The Holland Tunnel, the Lincoln Tunnel, the George Washington Bridge, the Bayonne Bridge, the Goethals Bridge, the Outerbridge Crossing, Port Authority Inland Terminal No. 1 (also known as the Port Authority Building), the New York Union Motor Truck Terminal, the Newark Union Motor Truck Terminal, the Port Authority Bus Terminal, La Guardia Airport, New York International Airport, Newark Airport, Teterboro Airport, the Port Authority Grain Terminal, Port Newark and the Hoboken-Port Authority Piers, and

ii. Any additional facilities, the establishment, acquisition, effectuation, construction, rehabilitation or improvement of which is financed or refinanced in whole or in part by the issuance of Consolidated Bonds;

and, except as otherwise provided herein the net revenues of each of said facilities are hereby irrevocably pledged to the payment of the debt service upon all Consolidated Bonds as the same may fall due, and shall be applied as provided in Section 5 hereof, and all Consolidated Bonds shall constitute a lien and charge thereon.

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The foregoing pledge and lien are, however, subject to and shall be subordinate to (but only to) the following prior pledges and liens:

(a) In the case of the revenues of the Holland Tunnel, the Lincoln Tunnel, the George Washington Bridge, the Bayonne Bridge, the Goethals Bridge, the Outerbridge Crossing, Port Authority Inland Terminal No. 1 (the Port Authority Building), the New York Union Motor Truck Terminal, the Newark Union Motor Truck Terminal, the Port Authority Bus Terminal and the Port Authority Grain Terminal,—to pledges heretofore made and liens heretofore created in favor of the aforesaid General and Refunding Bonds;

(b) In the case of the revenues of La Guardia Airport, New York International Airport, Newark Airport and Teterboro Airport,—to pledges heretofore made and liens heretofore created in favor of the aforesaid Air Terminal Bonds;

(c) In the case of the revenues of Port Newark, —to pledges heretofore made and liens heretofore created in favor of the aforesaid Marine Terminal Bonds.

Consolidated Bonds shall not be issued for any purpose in connection with any facility unless after the accomplishment of such purpose the debt service upon all Consolidated Bonds shall constitute a first lien and charge upon the net revenues of the Authority from such facility subject, however, to (but only to) the prior liens recited in the preceding paragraph.

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SECTION 5. Application of Revenues.

Subject to the prior pledges and liens described in Section 4 of this resolution, all net revenues pledged as security for Consolidated Bonds shall be applied to the following purposes in the following order:

(a) To the payment of debt service upon all Consolidated Bonds;

(b) All remaining balances of net revenues pledged as security for Consolidated Bonds shall be paid into the Consolidated Bond Reserve Fund established by Section 7 of this resolution, except such amounts as may be necessary to maintain the General Reserve Fund in the amount prescribed by the General Reserve Fund statutes.

The pledge of net revenues made in Section 4 of this resolution (and the lien and charge of Consolidated Bonds upon such net revenues) shall be subject to the right of the Authority to make payments into the General Reserve Fund to the extent above provided in this Section 5, and to that extent only.

SECTION 6. General Reserve Fund.

The payment of the debt service upon all Consolidated Bonds, regardless of the series or installment of which they form a part, and regardless of the dates of their issuance or maturity or the purposes for which issued, shall be further secured equally and ratably by the General Reserve Fund; and the pledge thereof and of the money which may be or become part thereof, contained in the resolution of the Authority, adopted March 9, 1931, establishing said

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General Reserve Fund, as amended May 5, 1932, is hereby expressly extended to and made applicable to (and for such purpose the General Reserve Fund is hereby irrevocably pledged as security for) all Consolidated Bonds for the benefit of the holders thereof, in the manner and to the extent set forth in the aforesaid resolution of March 9, 1931, as amended May 5, 1932, *pari passu* with bonds heretofore issued by the Authority and with the holders of such bonds; *provided,* that nothing herein shall be construed to grant or confer greater rights in or to said General Reserve Fund upon the holders of Consolidated Bonds than are now granted or conferred upon the holders of the bonds of prior issues.

The foregoing pledge is subject to (but only to) the following separate rights which the Authority hereby reserves to itself:

(a) The right to pledge said General Reserve Fund as security for any bonds whatsoever hereafter issued by the Authority as security for which it may at the time be authorized by law to pledge the General Reserve Fund; and

(b) The right to use the moneys in said General Reserve Fund to meet, pay or otherwise fulfill any of the undertakings which it has assumed, does now assume by this resolution or shall hereafter assume to or for the benefit of the holders of any bonds as security for which said General Reserve Fund has heretofore been or is now pledged, or for which said General Reserve Fund may hereafter be pledged as above provided;

provided, that no greater rights in or to the General Reserve Fund shall hereafter be granted to or conferred

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upon the holders of any bonds now outstanding or any bonds hereafter issued than are granted to and conferred upon the holders of all Consolidated Bonds.

Except as provided in the next sentence of this paragraph, the moneys in the General Reserve Fund shall not be used for any purpose at any time if there are any other moneys of the Authority available for that purpose at such time, and shall not be used for the payment of debt service prior to the time when the interest, sinking fund payments, redemption prices, principal amounts and other items constituting such debt service shall be required to be paid or set aside by the Authority; and the moneys in said General Reserve Fund shall be deposited in such depositories as the Authority may designate or invested in obligations of or guaranteed by the United States. If, however, there shall at any time be in or available for payment into all debt reserve funds of the Authority an aggregate amount of moneys in excess of an amount equal to two years' debt service upon all those bonds of the Authority which are secured by a pledge of the General Reserve Fund and which are outstanding at that time, to the extent that such moneys in or available for payment into such debt reserve funds will be available to pay debt service upon such bonds during the ensuing twenty-four calendar months, then and in any such event such excess moneys may be used at such time for any purpose for which said moneys may be used under the General Reserve Fund statutes, whether or not there are other moneys available for that purpose; and such excess moneys may be deposited in such depositories as the Authority may designate or invested in bonds, notes or other obligations of or guaranteed by the United States, the State of New York or the State of New Jersey, and any

bonds of the Authority theretofore actually issued and negotiated and secured by a pledge of the General Reserve Fund. Two years' debt service, when used in this paragraph with respect to bonds outstanding at any time, shall mean the amounts which the Authority is obligated by contract with the holders of such bonds to pay as debt service upon such bonds during the ensuing twenty-four calendar months; *provided, however,* that in computing such two years' debt service on any such outstanding bonds which are short-term bonds there shall be substituted for the actual debt service on such short-term bonds during said ensuing twenty-four calendar months the debt service which would be payable during said twenty-four calendar months if such short-term bonds were forthwith refunded by bonds having the following characteristics: maturity—thirty years from such time; interest—at the same rate as upon the short-term bonds and payable semi-annually beginning six months from such time; amortization—in such annual amounts as would be required to retire the principal amount of the short-term bonds outstanding at such time by the thirtieth anniversary of such time if such annual retirement were effected at par at each anniversary of such time and if the annual debt service thereon would be equal for all years thereafter until such thirtieth anniversary.

The resolution of the Authority, adopted March 9, 1931, establishing said General Reserve Fund, as amended May 5, 1932, is hereby further amended to conform to the provisions of this Section 6; *provided, however,* that nothing contained in this Section 6 shall be construed to limit, curtail or impair any pledge of the General Reserve Fund or regarding its administration, investment and use made in favor of or for the benefit of the holders of any bonds of

prior issues or to prevent the Authority from doing any act or thing required to be done in the fulfillment of any such pledge.

SECTION 7. Consolidated Bond Reserve Fund.

There is hereby established a special fund (herein called the Consolidated Bond Reserve Fund) the moneys in which are hereby pledged as additional security for all Consolidated Bonds, into which shall be paid all balances of net revenues pledged as security for Consolidated Bonds, remaining after deducting the amounts for which provision is made in subdivisions (a) and (b) of Section 5 of this resolution. The moneys in the Consolidated Bond Reserve Fund shall be accumulated or in the discretion of the Authority shall be applied to any of the following purposes and to such purposes only:

(a) To the payment of Consolidated Bonds at maturity, but in case a sinking fund has been established for the retirement of bonds of the series of which such bonds form a part only if the available moneys in such sinking fund are insufficient for such purpose, and in the case of other Consolidated Bonds, only if the net revenues pledged as security for Consolidated Bonds for the calendar year in which such payment shall be due and which are available for such payment are insufficient for such purpose.

(b) To the payment of debt service upon Consolidated Bonds then outstanding (other than the payment of such bonds at maturity), but only if the net revenues pledged as security for Consolidated Bonds

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for the calendar year in which such payment shall be due and which are available for such payment are insufficient for such purpose.

(c) To the purchase for retirement of Consolidated Bonds of any series as determined by the Authority at such prices as the Authority may determine to be reasonable; *provided, however,* that in case all of the bonds of such series are subject to redemption six months or less from the date on which the bonds are to be purchased for retirement, then such prices shall not exceed the highest price at which all of the bonds of such series might be redeemed at or prior to the expiration of said six months. Such purchases may be made at the discretion of the Authority, at public or private sale, with or without advertisement and with or without notice to other holders of Consolidated Bonds, and bonds theretofore issued and negotiated and then held by the Authority for investment may be purchased, as well as bonds held by others. In ascertaining whether the purchase price of any bond comes within the maximum above specified, brokerage commissions and similar items shall not be taken into consideration. The bonds so purchased shall be forthwith cancelled.

(d) To the redemption of Consolidated Bonds of any one or more series as may be determined by the Authority, if such bonds are subject to redemption. The bonds so redeemed shall be forthwith cancelled.

(e) To the payment of expenses incurred for the operation, maintenance, repair and administration

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of any facility the net revenues of which are pledged as security for Consolidated Bonds (including the expenses specified in the definition of net operating revenues in Section 1 of this resolution), but only to the extent that the gross operating revenues of such facility for the calendar year in which such payment shall be due, are insufficient or unavailable for such purpose.

(f) To the payment of debt service upon bonds other than Consolidated Bonds which are described in the last paragraph of this Section 7.

(g) To any other or additional purposes for which the Authority is now or may hereafter be authorized by law to expend the revenues of its facilities. (pp. 62-65) • • •

SECTION 12. Miscellaneous Covenants.

The Authority covenants and agrees with the holders of Consolidated Bonds, and with each such holder, as follows:

(a) Fully and faithfully to perform all duties required by the Constitutions and Statutes of the United States and of the States of New York and New Jersey, and by the Compact of April 30, 1921, between said two States, with reference to all facilities the net revenues of which are pledged as security for Consolidated Bonds,—those hereafter established, constructed or acquired by it, as well as those presently owned, leased or operated by it.

(b) Not to issue any more General and Refunding Bonds of the issue established March 18, 1935, Air

Terminal Bonds of the issue established June 18, 1948 or Marine Terminal Bonds of the issue established November 23, 1948 in addition to the bonds of those issues outstanding at the adoption of this resolution. This covenant and agreement shall not only be with and for the benefit of holders of Consolidated Bonds but shall also be with and for the benefit of holders of outstanding bonds of prior issues and shall not be subject to modification except in accordance with the provisions of the resolutions establishing such prior issues in addition to the provisions of Section 16 of this resolution.

(c) To proceed promptly and in an economical and efficient manner with the effectuation, establishment, acquisition, construction, rehabilitation or improvement of all facilities, the effectuation, establishment, acquisition, construction, rehabilitation, or improvement whereof is financed with Consolidated Bonds.

(d) To maintain in good condition all facilities the surplus revenues of which are payable into the General Reserve Fund, and to operate them in an efficient and economical manner, making all such renewals and replacements and acquiring and using all such equipment as the Authority shall determine to be necessary or desirable for the proper and economical maintenance and operation thereof.

(e) To make such improvements as part of or in connection with facilities the surplus revenues of which are payable into the General Reserve Fund as the Authority shall determine to be necessary or

desirable as incidental to or in connection with the operation of said facilities.

(f) To establish and collect flight fees, wharfage, dockage, rents, tolls and other charges in connection with facilities the net revenues of which are pledged as security for Consolidated Bonds, to the end that at least sufficient net revenues may be produced therefrom at all times to provide for the debt service upon all Consolidated Bonds.

(g) In the event the net revenues pledged as security for Consolidated Bonds are insufficient to provide for the debt service upon any or all Consolidated Bonds, to make good any deficiency out of the General Reserve Fund or other available revenues, moneys or funds; and for that purpose to establish, maintain and collect flight fees, wharfage, dockage, rents, tolls and other charges in connection with facilities the surplus revenues of which are payable into the General Reserve Fund (including facilities the net revenues of which are not pledged as security for Consolidated Bonds), to the end that combined surplus revenues may be produced therefrom at least sufficient to make good (through the medium of the General Reserve Fund) any deficiency in the debt service upon Consolidated Bonds, *provided, however,* that nothing herein contained shall be deemed to constitute an agreement or covenant by the Authority to make any payments into the General Reserve Fund in excess of the payments required to be made pursuant to the General Reserve Fund statutes.

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(h) To keep all facilities the surplus revenues of which are payable into the General Reserve Fund (and all structures, equipment and properties forming part thereof) insured, if such insurance is obtainable at reasonable rates and upon reasonable conditions, against such risks, in such amounts and with such deductibles as the Authority shall deem necessary for the protection of the holders of Consolidated Bonds.

(i) Duly and punctually to pay or cause to be paid the debt service upon all underlying mortgage bonds outstanding in connection with all or any part of any facility the surplus revenues of which are payable into the General Reserve Fund, in strict conformity with the terms of such bonds.

(j) To make all such expenditures as the Authority shall determine are necessary or desirable for, in connection with or incidental to the fulfillment of any of the covenants or other undertakings assumed by the Authority to or for the benefit of the holders of any Consolidated Bonds in this Section 12 or in any other section of this resolution or in any other resolution relating to Consolidated Bonds.

(k) In case any facility or any real property constituting a portion of a facility, the net revenues of which are pledged as security for Consolidated Bonds, is sold by the Authority or is condemned pursuant to the power of eminent domain, to apply the net proceeds of such sale or condemnation to capital expenditures upon facilities the net revenues of which are pledged as security for Consolidated

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Bonds, or to the retirement of Consolidated Bonds or bonds of prior issues after satisfying any prior obligations in respect of such facilities or in respect of the disposition of such proceeds; *provided, however,* that nothing herein contained shall be construed to prevent the Authority from applying the award in any condemnation proceeding in accordance with the Agreement with respect to the Newark Marine and Air Terminal between the City of Newark and the Authority, dated October 22, 1947, or the Agreement with respect to Municipal Air Terminals between the City of New York and the Authority, dated April 17, 1947, or any lease or other agreement for the use of real property heretofore or hereafter entered into by the Authority whether as landlord, tenant, licensor, licensee or otherwise. (pp. 67-68)

• • •

SECTION 16. Modifications.

(a) The Authority may from time to time and at any time, without authorization, consent or other action by any of the holders of Consolidated Bonds, modify or amend this resolution, or any other resolution relating to Consolidated Bonds, but only for the purpose of curing any ambiguity or of curing or correcting any defective or inconsistent provision, or for any other purpose not inconsistent with this resolution or with any other resolution relating to Consolidated Bonds; *provided,* that no such amendment made pursuant to this sub-section (a) shall alter or impair the obligation of the Authority, which is absolute and unconditional, to pay the principal and interest of any bond at the time and place and at the rate

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or amount and in the medium of payment prescribed therein, or shall alter or impair the security of any bond, or otherwise alter or impair any rights of any bondholder.

(b) In addition to the power given in sub-section (a) of this Section 16, any of the terms or provisions of this resolution (or of any resolution amendatory of or supplemental to this resolution) may be amended, repealed or modified in the manner hereinafter set forth in this Section 16, for the purpose of modifying or amending in any particular any of the terms or provisions (including, without the generality of the foregoing, any provisions regarding amortization and retirement) of any of the Consolidated Bonds or of any of the coupons pertaining thereto; *provided,* that no such amendment, repeal or modification shall alter or impair the obligation of the Authority, which is absolute and unconditional, to pay the principal and interest of any Consolidated Bond at the time and place and at the rate or amount and in the medium of payment prescribed therein, without the express consent of the holder of such bond.

i. Whenever the Authority shall desire any such amendment, repeal or modification of any of the provisions of this resolution (or of any resolution amendatory of or supplemental to this resolution), it shall call a meeting of the holders of Consolidated Bonds (or if the amendment, repeal or modification proposed shall affect the rights of the holders of such bonds of only one or more particular series or installments, then of the holders of all Consolidated Bonds of each such series or installment so to be affected) for the purpose of considering and acting upon any such proposed amendment, repeal or modi-

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fication. A notice specifying the purpose, place, date and hour of such meeting shall be published by the Authority in a daily newspaper of general circulation in the City of New York, State of New York, and also in one or more daily newspapers of general circulation in one or more of the following cities: the City of Boston, Commonwealth of Massachusetts; the City of Philadelphia, Commonwealth of Pennsylvania; the City of Chicago, State of Illinois; and the City of San Francisco, State of California. Such notice shall be published once a week for four consecutive weeks, the first publication to be not less than thirty days nor more than ninety days prior to the date fixed for the meeting. Such notice shall briefly set forth the nature of the proposed amendment, repeal or modification, and shall give notice that a copy thereof is on file with the Authority for inspection by the holders of the bonds. On or before the date of the first publication of the notice, a similar written or printed notice shall be mailed by the Authority, postage prepaid, to the holders of such bonds registered either as to principal or as to both principal and interest, at the addresses appearing on the registry books of the Authority, and who are to be affected by the proposed amendment, repeal or modification. The actual receipt by any bondholder of notice of such meeting shall not be essential to the validity of such meeting and a certificate by the Authority, duly executed by its Chairman or Vice-Chairman, that the meeting has been called and notice thereof given as herein provided, shall be conclusive as against all parties, and it shall not be open

to any bondholder to show that he failed to receive notice of such meeting or to object to the form of such notice, *provided,* that such notice shall conform substantially to the provisions of this subdivision i of this sub-section (b) of this Section 16.

ii. No person shall be entitled to vote at such meeting unless he shall be a holder of a Consolidated Bond or shall hold a proxy duly executed by such a bondholder, and (1) he shall present at the meeting his Consolidated Bond or Bonds (or in the case of the holder of a proxy, the Consolidated Bond or Bonds of his principal), or (2) he shall present at the meeting a certificate of the character herein described in subdivision iii of this sub-section (b) of this Section 16, or (3) his name (or, in the case of the holder of a proxy, the name of his principal) shall appear as a registered bondholder on the list prepared and presented to the meeting by the Registrar as provided in subdivision iii of this sub-section (b) of this Section 16.

iii. Any holder of Consolidated Bonds may, prior to any such meeting, deliver his Consolidated Bond or Bonds, at his own expense, to any Registrar of Consolidated Bonds, or to such bank, banking firm or trust company as shall be satisfactory to the Authority, and thereupon shall be entitled to receive an appropriate receipt for the bonds so deposited, calling for the re-delivery of such bonds at any time after the meeting. A certificate signed by any such Registrar, or by any such bank, banking firm or trust company that the bonds have been so deposited, and

giving the amount, denomination, series and numbers thereof, shall be sufficient evidence to permit the holder of any such certificate, including the holder of a proxy who shall produce such certificate, to be present and to vote at any meeting. The Registrar or Registrars of Consolidated Bonds shall prepare and deliver to the Authority at the time of the convening of the meeting a list of the names and addresses of the registered holders of the bonds proposed to be affected by said amendment, repeal or modification, as of the close of business on the day before the date set for the meeting, or the date to which such meeting shall have been adjourned, together with a statement of the denominations, series and numbers of the bonds registered in the name of each such registered holder.

iv. The Authority shall present to the meeting at the convening thereof a statement in writing duly executed by its Chairman or Vice-Chairman or by the Chairman or Vice-Chairman of its Committee on Finance, listing the denominations, series and numbers of all bonds of all series proposed to be affected by said amendment, repeal or modification, owned by it or held for its account directly or indirectly, including any bond registered in the name of the Authority or held for the account of any debt reserve fund of the Authority, and no person shall be permitted at the meeting to cast any vote or give any consent because of any bonds listed on such statement, and no such bonds (hereinafter referred to as Authority-owned bonds) shall be counted in determining any vote at such meeting, including the determination of whether or not a quorum is present.

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v. A representation of at least 60% in aggregate principal amount of the Consolidated Bonds then outstanding (exclusive of Authority-owned bonds) or, if the amendment, repeal or modification proposed shall only affect the rights of the holders of one or more particular series or installments of Consolidated Bonds, then 60% in aggregate principal amount of the bonds outstanding (exclusive of Authority-owned bonds) of each such series or installment so to be affected, shall be necessary to constitute a quorum at any such meeting of bondholders; but less than a quorum may adjourn the meeting from time to time and the meeting may be held as adjourned without further notice, whether such adjournment shall have been held by a quorum or by less than a quorum. The Authority shall designate a Commissioner or officer of the Authority to preside as temporary chairman, and such temporary chairman shall immediately call for nominations for a permanent chairman for such meeting. Such permanent chairman shall be some person who shall be a bondholder, or the holder of a proxy, entitled to vote at the meeting. At such meeting each person shall be entitled to one vote for each $1,000 principal amount of such bonds held or represented by him as provided in subdivision ii of this sub-section (b) of this Section 16, and such vote shall be cast by ballot. Except as herein provided, the meeting may adopt its own rules of procedure.

vi. At any such meeting as aforesaid, the Authority shall submit for consideration and action of the holders of Consolidated Bonds or, if the amend-

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ment, repeal or modification proposed shall only affect the rights of the holders of one or more particular series or installments of Consolidated Bonds, then of the bondholders of each such series or installments to be affected, a proposed resolution embodying the amendment, repeal or modification to be considered by the meeting. If such proposed resolution shall be consented to and approved (either in person or by proxy) by the holders of at least 60% in aggregate principal amount of the bonds to be affected thereby outstanding at the time (exclusive of Authority-owned bonds), then, and in such case, the Authority shall thereby be authorized and empowered to adopt such resolution, and any such resolution so adopted by the Authority shall be binding upon all bondholders, whether or not present at such meeting in person or by proxy, *provided* that no such amendment, repeal or modification shall affect the rights of the holders of one or more series or installments of Consolidated Bonds in a manner or to an extent differing from that in or to which the rights of holders of any other series or installments of Consolidated Bonds are affected unless such resolution shall be approved (either in person or by proxy) by the holders of at least 60% in aggregate principal amount of the Consolidated Bonds then outstanding (exclusive of Authority-owned bonds) of each such series or installment so affected; and no bondholder shall have any right or cause to object to the adoption of any such resolution by the Authority or to object to any of the terms or provisions therein contained or the exercise thereof or of the authorizations con-

tained therein, or in any manner to question the propriety of the adoption thereof or to enjoin or restrain the Authority from executing the same or from taking any action pursuant to the provisions thereof.

vii. Upon the adoption by the Authority of any resolution pursuant to the provisions of this Section 16, this resolution (and any resolution supplemental to or amendatory of this resolution) shall be and be deemed to be modified and amended in accordance therewith, and the respective rights, duties and obligations of the Authority and all holders of outstanding bonds shall be thereafter determined, exercised and enforced subject, in all respects, to such modifications and amendments.

viii. Minutes of all resolutions adopted and proceedings had at every such meeting shall be made and duly entered in books to be from time to time provided for that purpose by the Authority, and any such minutes as aforesaid, if signed by the chairman of the meeting at which such resolutions were passed or proceedings had, shall be prima facie evidence of the matters therein stated, and until the contrary is proved, every such meeting in respect of the proceedings of which minutes shall have been so made and signed shall be deemed to have been duly held and conveyed, and all resolutions passed thereat or proceedings had thereat shall be deemed to have been duly passed and had.

As use above in this Section 16, the terms "bond" and "Consolidated Bond" shall include any interim receipt

therefor; and the terms "bondholder" and "holder" of a "Consolidated Bond" shall include the holder of such an interim receipt.

SECTION 17. Determinations.

Whenever in this resolution it is provided that any selection, designation, determination or estimate shall or may be made by the Authority or that any action may be taken or withheld by the Authority or that any action shall or may be taken or withheld at the option of or dependent upon the opinion, discretion or judgment of the Authority, then the Authority's such selection, designation, determination, estimate, action, option, opinion, discretion or judgment expressed by its Board of Commissioners or by a committee or officer or other person duly authorized shall be conclusive for the purposes of this resolution.

APPENDIX VI

RESOLUTION ESTABLISHING FORTY-FIRST SERIES OF CONSOLIDATED BONDS, DUE 2008
(September 13, 1973)

WHEREAS, heretofore and on the 9th day of October, 1952, The Port Authority of New York and New Jersey (formerly known as The Port of New York Authority and hereinafter called the Authority) adopted a resolution providing for the issuance of certain direct and general obligations of the Authority, hereinafter called Consolidated Bonds, from time to time, in conformity with said resolution for the purposes therein set forth, which resolution is hereinafter called the Consolidated Bond Resolution,

and which resolution constitutes a contract with the holders of the bonds so issued; and

WHEREAS, said Consolidated Bond Resolution provides that such Consolidated Bonds shall be issued in such series as the Authority may determine, and that the characteristics of the bonds of each series shall be determined by the Authority by and in the resolution establishing such series, and that the resolution establishing any series may contain other terms and provisions not inconsistent with the Consolidated Bond Resolution; and

WHEREAS, the Authority has heretofore established various series of said Consolidated Bonds and has now determined that it is necessary, advisable and in the public interest to establish another series of said Consolidated Bonds, without prejudice to its right hereafter to establish other and additional series of such Consolidated Bonds;

NOW, THEREFORE, be it resolved by The Port Authority of New York and New Jersey: (pp. 69-72)***.

SECTION 7. The Authority shall not apply any monies in the Consolidated Bond Reserve Fund or in any special reserve fund established for the benefit of the bonds of any prior issue of bonds except for the payment of bonds secured by a pledge of the General Reserve Fund in whole or in part, the payment of debt service upon bonds so secured, the purchase for retirement of bonds so secured or the redemption of bonds so secured, or for the payment of expenses incurred for the establishment, acquisition, construction or effectuation, or for the operation, maintenance, repair or administration of any facility financed or refi-

nanced in whole or in part by bonds secured by a pledge of the General Reserve Fund in whole or in part, or otherwise for the fulfillment of any undertakings which the Authority has assumed or may or shall hereafter assume to or for the benefit of the holders of bonds secured by a pledge of the General Reserve Fund in whole or in part; provided, however, that nothing herein contained shall be construed to permit the application by the Authority of monies in the Consolidated Bond Reserve Fund or in any special reserve fund established for the benefit of the bonds of any prior issue of bonds except for purposes and upon conditions which in the case of the Consolidated Bond Reserve Fund are authorized by the Consolidated Bond Resolution or in the case of said special reserve funds are authorized by the respective resolutions establishing such prior issues of bonds.

Consolidated Bonds proposed to be issued for purposes in connection with an additional facility or a group of additional facilities in connection with which the Authority has not theretofore issued bonds which have been secured by a pledge of the General Reserve Fund in whole or in part, may be issued, and bonds other than Consolidated Bonds proposed to be issued for purposes in connection with such an additional facility or group of additional facilities may be secured by a pledge of the General Reserve Fund in whole or in part, in each case if and only if the Authority shall certify at the time of issuance (as defined in Section 3 of the Consolidated Bond Resolution) its opinion that the issuance of such Consolidated Bonds or that such pledge of the General Reserve Fund as security for such bonds other than Consolidated Bonds will not, during the ensuing ten years or during the longest term of

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any of such bonds proposed to be issued (whether or not Consolidated Bonds), whichever shall be longer, in the light of its estimated expenditures in connection with such additional facility or such group of additional facilities, materially impair the sound credit standing of the Authority or the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds; and the Authority may apply monies in the General Reserve Fund for purposes in connection with those of its bonds and only those of its bonds which it has theretofore secured by a pledge of the General Reserve Fund in whole or in part. Expenditures in connection with an additional facility or group of additional facilities shall mean the amount of the excess, if any, of the sum of all items of expense to be considered in determining the net revenues of the additional facility or group of additional facilities plus the debt service upon the bonds proposed to be issued and upon any additional bonds which in the Authority's opinion would be required to be issued to place and maintain such facility or group of facilities upon a sound operating basis, over and above the sum of all items of revenue and income to be considered in determining such net revenues. (p. 76) • • •

Excerpts From Exhibit III to Stipulation Among Counsel Dated December 20, 1974

THE PORT AUTHORITY OF NY & NJ
1973 ANNUAL REPORT

• • •

"PLAINFIELD CORRIDOR SERVICE PROJECT

As authorized by the States in 1973, PATH began detailed planning for the Plainfield Corridor Service Project, an extension of PATH from Newark to Plainfield via Newark International Airport and Elizabeth, more than double the present mileage of PATH.

Primary goal of the PATH extension is the retention of rail service for approximately 8,000 riders of the Central Railroad of New Jersey (CNJ), whose rail service has been threatened with abandonment. The proposed extended service also would include a new station stop at McClellan Street, Newark, to provide rail service to Newark International Airport.

As part of this extension, a new rail line would be constructed alongside the Penn Central tracks between Penn Station-Newark and Elizabeth, including the airport station at McClellan Street.

Basic system and structural improvements would be required along the CNJ right-of-way between Elizabeth and Plainfield, including station construction at Elizabeth, Roselle/Roselle Park, Cranford, Westfield/Garwood, Fanwood/Scotch Plains and Plainfield.

Forty-four new rapid transit cars would be purchased by PATH and many existing cars would be extensively refurbished for the service. Other equipment for track, signal and power systems also would be required.

The estimated gross cost of the Plainfield Corridor Service Project is $221,510,000, toward which an 80 percent capital grant would be required under the Federal Urban

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Mass Transportation Program. A preliminary grant application was filed in October, and public hearings called for by UMTA, the responsible Federal agency, were scheduled for January 1974.

The local share would be provided by the Port Authority and, to the extent necessary, the State of New Jersey.

The PATH extension would relieve the taxpayers of the State of New Jersey of the present operating subsidy obligations for CNJ passenger service in the area served and of the responsibility for capital improvement programs which had been identified for the CNJ in the Corridor.

Detailed planning and community contact work were under way throughout the year. Through meetings with community officials, planners and trade and civic leaders, every effort was made to acquire data and encourage citizen participation in the planning process.

"Penn Station Direct Access

The Plainfield Corridor Service Project is one element in a three-part metropolitan area rail transportation improvement program delegated to the Port Authority. The second is a project to provide rail service to Kennedy International Airport (see page 27). The third is the Penn Station Direct Access Project, which calls for rail connections and station improvements at Penn Station-New York to permit operation of Erie Lackawanna trains directly into New York City.

Track connections between the Penn Central and Erie Lackawanna railways in Kearney and Secaucus will permit selected Erie Lackawanna trains, carrying some 20,000 riders, to travel directly into Manhattan from areas in northern New Jersey and upstate New York. The project also includes construction of a new high-level Penn Central

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bridge over the Hackensack River and construction of yard facilities in New Jersey.

Detailed design work has been in process on the Penn Station Direct Rail Access Project throughout the year. Consultants are undertaking computer simulations of the train movements into and out of Penn Station to reach detailed engineering design decisions. They also are studying power, signal systems and communications improvements included in the plan." (pp. 12-15).***

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SELECTED FINANCIAL DATA

	1973
Net Revenues	
Gross Operating Revenues	$ 373,497
Operating Expenses	236,434
Net Operating Revenues	137,063
Other Income	23,615
Net Revenues Before Debt Service	160,678
Interest on Bonded Debt	49,729
Balance Available for Debt Retirement and Reserves	110,949
Times, Interest Earned	3.23
Mandatory Long-Term Debt Retirements	26,047
Net Revenues after Debt Service	$ 84,902
Times, Debt Service Earned	2.12
Net Changes in Reserves	
Transferred from Revenues (above)	$ 84,902
Interest on Bank Loans	(6,775)
Bank Loan Payment	(35,000)
Short-Term Note Retirements	—
Long-Term Debt Retirement Acceleration	—
Invested in Facilities	(8,000)
Debt Service on Bonds Secured by Trusts	(6,874)
Adjustment of Securities Value	(3,591)
Net Change	$ 24,662

Excerpts from Exhibit III to Stipulation Among Counsel Dated December 20, 1974

	1973
Reserves—at Year End	
General Reserve	$ 173,487
Special Reserve	16,047
Air Terminal Reserve	22,664
Marine Terminal Reserve	2,634
Consolidated Bond Reserve	21,932
Total	$ 236,764
Dept—At Year End	
General and Refunding Bonds	$ 14,586
Air Terminal Bonds	20,577
Marine Terminal Bonds	2,417
Consolidated Bonds and Notes	1,697,287
Total Bonded Debt	1,734,867
Bank Loans	295,000
Total	$2,029,867
Invested in Facilities—At Year End	$3,272,913
Debt Retirement Through Revenues and Reserves	
Annually	$ 66,943
Cumulative	$1,261,357

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Exhibit V to Stipulation Among Counsel
Dated December 20, 1974

A History of
THE PORT OF NEW YORK AUTHORITY
Financial Structure

taken from
an extemporaneous talk
By Daniel B. Goldberg
General Solicitor of the Port Authority

before
the executive staff of
The Port of New York Authority
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Introduction

At the time this talk was given in 1961, the Port Authority was about to enter a new phase of its financial history. Our organization was about to be asked by the Legislatures and Governors of the two States to assume responsibility for the bankrupt Hudson and Manhattan Railroad—a completely new kind of facility and one which we were convinced would never become self-supporting—without impairing our credit standing.

As the Port Authority's brilliant General Solicitor, Mr. Goldberg has played a key role, if not *the* key role, in the development of the Authority's present financial structure. He has also helped to build and protect the Authority's enviably sound fiscal integrity upon which our future rests. And he served as the chief architect of those financial safeguards, described in this talk, which made it possible the following year for us to assume responsibility for the H&M with adequate financial safeguards. His talk therefore has historical value in itself as well as being a lively and lucid explanation of how our financial structure grew over the years and how it works today.

A History of the Port Authority's Financial Structure

I'm going to start with an historical approach, because the history of the Port Authority's financing is almost a history of the Port Authority itself. Engineers built bridges and airports, and plans were made and the reports were promoted and developed before the Port Authority came along, but the innovation which the Port Authority represents, aside from interstate cooperation, is its legal and financial mechanism. So, let's go back in time to 1926 when the Port Authority put out its first bonds—its Series A bonds to construct the Arthur Kill bridges. The patterns of those bonds and of the Series B bonds for the George Washington Bridge and of the Series C bonds for the Bayonne Bridge were the same, so we can group them all together and this we can call Phase I.

Phase I

Closed End Bonds

The important point that distinguishes those first bonds from most that came along later was that they were not open-end bonds; they were closed-end bonds. An estimate was made of how much money it was going to take to build each bridge and that is the amount of the bonds which was authorized. We might borrow it all at one time—or at two times as in the case of the George Washington Bridge—but basically, we could not thereafter sell any more than the originally stipulated dollar amount for the originally identified facility. Those early bond issues were therefore closed-end issues.

The Series A bonds for the Arthur Kill bridges, the Series B bonds for the George Washington Bridge and the Series C bonds for the Bayonne Bridge had an identical pattern of application of gross revenues, which you can think of as the revenue flow. To trace the revenue flow in those early days, we start with the gross revenues coming in from the operation of each of the bridges. These were to be applied first to the expenses of operation and maintenance—O&M as we call it—of that bridge. Then the balance left in the case of each bridge was to be applied to debt service on the particular series of bonds which financed that particular bridge.

Now for those who are uninitiated in these "mysteries," debt service really means the same thing you pay as you make monthly payments on the mortgage on your home—it is a combination of interest and amortization of the principal of your loan. Debt service in the cases of our early closed-end bonds consisted of the interest on the bonds and some sinking fund requirements which were supposed to take care of repaying the principal. The setup then called for surplus revenues of each bridge after debt service on its particular bonds to go into separate statutory reserve funds, each of which was set up in the statute which authorized the financing of the particular bridge.

I needn't tell you that in fact there wasn't any surplus to take care of this statutory reserve. There was difficulty in meeting the debt service on those early bonds when the traffic estimates turned out to be more than the lean 1929-31 depression years produced.

Phase II

The second phase was the phase in which the walls between the individual facility revenue flows and the

individual bond issues turned out to be Walls of Jericho and fell down at the blast of the trumpet of the General Reserve Fund Statutes. In the early financial-legal structure, there was no way for any surplus, if it *had* been cleared by any one of the bridges, to have been used to supplement the revenue flow of any other facility which turned out to be a weak sister needing help to meet the demands under its bond indenture.

And so in 1931 the second phase of the Port Authority's financing began. I looked up some dates this morning and I found that the statute authorizing the General Reserve Fund was adopted on March 5, 1931, and the Port Authority had it pledged on March 9. It only took four days to use the new statutory authorization.

The first use was in connection with new Series D bonds and new Series E bonds. Series D bonds were to finance this Inland Terminal Building in which we now sit. The E bonds were to pay the two States the $50 million which they had spent to construct the Holland Tunnel, and for which the States were to turn over to the Port Authority the control of the revenues and operation of the Holland Tunnel. These two bond series provided pretty much the same pattern of revenue flow which I outlined for the older bonds, but there was a big new addition. And the big new addition was the General Reserve Fund.

General Reserve Fund

The General Reserve Fund is the absolute foundation of the Port Authority's whole financial structure. It is what made possible practically every advance after the first faltering steps in the initiation of our financial program with the first bridges. What we have had since 1931 is a statute which directs the Port Authority to pool the

revenues of all its facilities and, having pooled them, to use —and to pledge in advance if necessary—the surplus revenues that each facility or group of facilities might produce after it had met the requirements of the revenue flow of its particular bonds, so as to cross the fallen "Walls of Jericho" and to meet the requirements of any financially weak facility which had not yet reached its stride or which for any other reason could not at a particular point of time carry its own load of O&M and debt service.

The General Reserve Fund has an upper limit. Surplus revenues must be paid into it to maintain it at an amount equal to ten per cent of the principal amount of bonds issued to finance Port Authority facilities.

At the time in 1931 when this structure was worked out, the Holland Tunnel was an established facility with revenues in excess of the requirements directly related to it. As you know, it was built by a pair of state agencies working together. When the two States turned it over to the Port Authority in 1931, it was known that from this time on, after the flow of money through operation, maintenance and debt service, a surplus would be produced from the Holland Tunnel which would flow into the General Reserve Fund, and that this surplus in the Fund could be used to flow back up and take care of any deficits which we might have between the revenues of the other facilities and the debt service on the particular bonds issued to finance them.

The Series D bonds, which I mentioned as being to finance the construction of this building, and the Series E bonds for the Holland Tunnel acquisition were sold as a package. You had to buy one to get the other.

So Phase II includes for the first time, beginning with 1931, the Port Authority's ability to use the surplus funds

of any facility that produced surplus funds to meet what the statutes called obligations to bondholders.

BONDHOLDERS' RESERVE

I want to make it clear that the General Reserve Fund is not a grab bag. It is not a pot to be collected for the States to dip into, as they might be impelled from time to time by political or other motivation. The General Reserve Fund, under the statutes, is exclusively a *bondholders' reserve*. It gets the surplus revenues each year which the facilities produce, beyond the requirements to bondholders, and it may be applied only to fulfill obligations to bondholders. Since we covenant with bondholders, in the case of each of our facilities, to operate and maintain them so as to produce revenues and also to pay the debt service—the principal, the interest, the sinking fund payments—on the bonds, the General Reserve Fund is available for O&M and debt service purposes. But, as I say, it is not a source for "dividend" payments to the States. The bondholders, for a modest interest payment, took the risk of insufficient revenues in lean years and accepted the absence of recourse to taxes; but they very naturally insisted that the fruits of any years of plenty remain available for the lean years which might come with depression or with war and gasoline rationing, with uninsurable catastrophes or simply because of over-optimistic estimates.

Now this was about the time, you'll remember, when the two States were also projecting the construction of the Lincoln Tunnel. The transfer to the Port Authority of the Holland Tunnel in 1931, with its obvious surplus revenues, was supposed to be the basis of our having a surplus with which to attract money from private investment sources for building the Lincoln Tunnel.

By the time 1931 closed, the Port Authority's financial structure was as follows: We had five facilities, we had five bond issues, we had five revenue flows, and we had the General Reserve Fund. The Holland Tunnel was producing surpluses beyond the requirements of Series E bonds while the General Reserve Fund, by means of the surpluses from the Holland Tunnel, was in a position to meet the deficits on requirements for the other bond issues. And we were exploring ways to finance the proposed new Lincoln Tunnel.

Phase III

The financial structure then had become quite complicated, and it was apparent that it ought to be simplified. So this is the time when we come to the General and Refunding phase for the Port Authority—what we'll call Phase III.

General and Refunding Bond Program

When the new program was started in 1935, the idea was to replace all of the earlier bonds by refunding them with the new type of bonds, General and Refunding (or G&R), and also to finance the construction of the Lincoln Tunnel by such new bonds.

There were other purposes for which the General and Refunding bonds were permitted, but they were quite limited and I'll refer to them a bit later.

At any rate, with the initiation of the General and Refunding bond issue, in time all of these earlier bonds—Series A, B, C, D, and E—were refunded, replaced with General and Refunding bonds. Also, we financed the Lincoln Tunnel with G&R bonds as was expected; we financed the Grain Terminal, or at any rate we repaid the State advance which came with the Grain Terminal from the State of New York and financed its improvement; we

financed our two Truck Terminals and our Midtown Bus Terminal; and we initiated capital improvements to the earlier existing facilities.

The General and Refunding bond structure is not ancient history as the earlier ones are. There are bonds of the General and Refunding bond issue still outstanding, and as long as these bonds are outstanding the Port Authority is bound by the contracts with those bondholders. And they're significant, too, in limiting us in the otherwise available use of our revenues.

Special Reserve Fund

The revenue flow in the case of the General and Refunding bonds now involved a pot of pooled revenues. The big Walls of Jericho between each separate facility were now down. We now had the money from all the facilities we owned at the time, including the Lincoln Tunnel, in a pooled G&R facilities revenue flow structure. These pooled revenues would be used first for operation and maintenance on all G&R facilities; then for debt service on the G&R bonds; and then put into a new contractual Special Reserve Fund which substituted for the various previous independent statutory reserve funds for each of the early Series A, B, and C bond issues.

What the States found was that in the earlier structure, the statutory reserve funds for each early issue which were to receive a fixed schedule of amounts set up in advance called for more than the Port Authority was able to meet. So when the General and Refunding bond program was initiated, it was felt that the amount of the equivalent reserve fund should be an elastic figure. The way it was worked out was that the Port Authority agreed with the bondholders that we would apply the monies for all of these

G&R facilities in this order: first operation and maintenance on all the facilities, then debt service on all the G&R bonds, then we would pay into the new Special Reserve Fund all of the remaining net revenues except those necessary to keep the General Reserve Fund at the 10 per cent figure.

We would use, as needed, all the revenues for operation and maintenance; as needed, all the remaining revenues for debt service; as needed, all the still remaining revenues to bring the General Reserve Fund up to the 10 per cent figure. But all the ultimate remaining balance would have to go into the Special Reserve Fund.

The General Reserve Fund didn't reach its upper-dollar limit of 10 per cent of the par value of the outstanding bonds for fifteen years. It first reached that figure at the end of 1946. But from 1946 to date the General Reserve Fund has always been full and payments could then be made into the Special Reserve Fund. Of course, the 10 per cent figure changes from year to year as the amount of the bonds goes up, or down. To date, it always has gone up at each year end.

Now this is lesson number one in the Port Authority's bond structure: There are no "free monies" in the Port Authority's bond structure; there is no pot of gold into which anyone can dip. The General Reserve Fund, as has been mentioned before, may be used only to fulfill obligations to bondholders—and basically again that means: operation and maintenance, debt service, and some capital expenditures that might be necessary within limitations.

The Special Reserve Fund which is created by contract with the General and Refunding bondholders has a similar limitation on it. We may use the Special Reserve Fund monies, obviously, for operating the General and Refunding bond facilities if any one of them might actually have

an operating deficit—I don't think that's been so, in fact. We can use them for various purposes like buying General and Refunding bonds in the open market to retire them, payments into sinking funds on General and Refunding bonds and other purposes relating to the payment of interest on and the retirement—even accelerated retirement—of the General and Refunding bonds.

Then there is a final provision in our agreement with regard to the Special Reserve Fund that we might use a certain amount (which is 50 per cent of the aggregate payments into the Fund) for certain other purposes. This has led to the belief in some quarters that the Port Authority has a residue of monies that is not pledged to bondholders. That is not the case.

The entire agreement with Port Authority General and Refunding bondholders is that the Special Reserve Fund must be used for purposes which will enhance or maintain the security of General and Refunding bonds. Since each facility whose revenue flow can end up in the General Reserve Fund can support each other such facility, the Special Reserve Fund monies need not necessarily be used only for General and Refunding bond facilities—you'll notice that at this point in our narrative we don't yet have air terminals in the picture and among marine terminals, only the Grain Terminal. So although, because of the interdependence of all General Reserve Fund facilities, the balances in the Special Reserve Funds which are not going to be used for General and Refunding bonds and their related facilities may cross over the line of the General and Refunding bond facilities, still they never can get out of the total General Reserve Fund family of facilities—which we can look upon at the present time as all Port Authority facilities.

There is no pot of loose gold in the case of the Port Authority. All revenues have been pledged and all reserves have been pledged.

As I have said, the purposes for which the General and Refunding bonds could be used were quite limited. They could be used for refunding, as they were to retire the old Series A, B, C, D, and E bonds. They could be used, and were used, to finance the Lincoln Tunnel. They could be used to *refund* bonds issued to start new facilities but could not themselves be used to start them. That means that if you could start a new facility by using not General and Refunding bonds but some bonds like the old Series A, B, C, D, and E bonds, you could refund them, with some strict roll-over tests, with General and Refunding bonds; but this presented you with the problem of how you were going to finance them in the first place if you didn't have the General Reserve Fund behind the special purpose bonds.

And then there was a limited $15 million of General and Refunding bonds which could be used for new facilities—not over $5 million for an individual facility. Now you know how far $15 million for a group of facilities or $5 million for a new facility would go in the post-war construction market. Capital improvements could be financed by General and Refunding bonds with very severe limitations. And then there was a meager $8½ million of possible G&R bonds we didn't have to do very much about justifying.

Phase IV

And so when in 1947 the Port Authority was confronted with the necessity of financing airports, it was obvious that the General and Refunding bond structure was absolutely unsuitable and could not work. So Phase IV of the Port Authority's financial history came into being. It was a

period during which we pretty much duplicated the General and Refunding bond revenue flow for a new issue of Air Terminal bonds, which could be issued only for air terminal purposes, and then we set up Marine Terminal bonds which again duplicated the flow for projected marine terminals.

We now had Air Terminal and Marine Terminal bonds as well as G&R bonds. We now had three separate families of facilities and bonds, each with a similar pattern, with the General Reserve Fund back of all of them and the ability to take the surplus revenues produced by each family of facilities and feed them back in to meet the shortages that either of the other two families was going to have. It was obvious when we started with the air terminals that they were not going to carry their own weight in the opening years of our management of them—so that the by now more than self-supporting G&R family, which included bridges and tunnels, would be able to contribute surpluses which we needed to support the Air Terminal Bonds and Marine Terminal Bonds in their earlier years.

Remember, however, that the way in which the George Washington Bridge, for example, could contribute surpluses to Newark Airport purposes was through the mechanism of the General Reserve Fund. George Washington Bridge revenues, along with the revenues of all other G&R facilities, were first applied to O&M of this group of facilities, then to G&R bond debt service, then to the Special Reserve Fund for G&R Bonds, and finally to the General Reserve Fund. As General Reserve Fund money, it could then be used to fulfill obligations to the holders of Air Terminal Bonds to operate Newark Airport and pay any debt service on Air Terminal Bonds which the Air Terminal group of facilities couldn't meet by itself.

Therefore, in setting up the Air Terminal Bonds and Marine Terminal Bonds, it was necessary to assure their

prospective purchasers that the General Reserve Fund was not going to be depleted in any untoward way. And so we evolved the two years' debt service resolution of November 13, 1947—which, unfortunately, is one of the most misunderstood parts of P.A. financial policy.

There are two sets of teeth in the two years' debt service resolution. One set restricts the purposes to which the General Reserve Fund may be applied. The second set establishes how the General Reserve Fund monies shall be invested. Neither set *requires*—as is so often misstated—that the General Reserve Fund shall at all times have in it an amount equal to the next two years' debt service. Such a restriction would defeat the purpose of a reserve fund which is to be available to be *used* in a financial emergency, even if the use brings the balance below a desirable figure.

Actually the resolution imposed no new limitations on the Port Authority's power to use that portion of the General Reserve Fund which represented an excess in all combined debt reserve funds (General and various special reserve funds) over the next two years' debt service at the time. But except for that excess over the next two years' debt service, the monies in the General Reserve Fund could no longer be used for accelerated debt retirement or for any other purpose for which there might be other funds available at the time.

Similarly, the amount in excess of the next two years' debt service could be invested subject to the ordinary governing contractual limitations—i.e., principally in the P.A.'s own bonds. But the amount up to the two years' debt service figure could now be invested only in U.S. Government bonds, or kept as cash on deposit.

This program of voluntary self-limitation helped to establish a favorable climate for Air Terminal bonds and

Marine Terminal bonds. By once again assuring the inviolability of the General Reserve Fund, it strengthened the basic security of these new bond issues until the new facilities on whose revenues they had a first lien should become self-supporting in their own right.

However, with three families of facilities and three related bond issues, we were getting to duplicate on a larger scale the original structure we had with our Series A, B, and C bonds; our structure was getting unwieldy again. So that by 1952, the need was felt to revise the bond structure once more, pretty much along the lines of the need we had felt around 1935 to have the streamlining of the General and Refunding bond issue.

Phase V

The motivation was partly streamlining and partly the fact that we were getting ourselves into a situation where we really didn't have any type of bond that we could put out except for a limited purpose. Air Terminal bonds were available only for air terminals, and Marine Terminal bonds for marine terminals; General and Refunding bonds, with their limitations of $5 million per project and $8½ million free, just didn't fit the cost pattern of the post-war age. And so in 1952 we set out to develop an entirely new streamlined bond structure—and that is the one that we're living with now.

Consolidated Bonds

We are now in Phase V, the Consolidated Bonds phase. The first thing we did was to provide that these bonds could be issued for unlimited purposes, that is, any purposes that The Port of New York Authority was authorized by statute to go forward with and to use the General Reserve Fund

in connection with. In the second place we came to the problem of the closed bond versus the open-end bond. The Consolidated Bonds, like the General and Refunding Air Terminal and Marine Terminal bonds before them, are an open-end bond. That is to say, there is no dollar amount which limits the amount of them that the Port Authority can issue. In the case of the General and Refunding bonds, the open-end feature had become more theoretical than real because the purposes were so limited; these small dollar limits on the amounts that we could put out to construct new facilities practically made G&R bonds only Lincoln Tunnel bonds or improvement bonds for existing facilities, or refunding bonds.

But as we came to draft the Consolidated Bond structure, we looked forward to the enormous post-war horizons that the Port Authority was facing up to. We needed a new financial device where the purposes would be unlimited, where the dollars would be unlimited, and only legality and financial practicability would impose the limits. You know that our financial program today calls for something like a billion dollars of new capital money to be raised over the next ten years. As of 1952, adding what we've done between that time and now, and what we have left to do, the figures were and are astronomical.

The holder of a Port Authority bond has nothing to look to for the repayment of the principal and interest on his bond except the revenues that the Port Authority can derive from the facilities in a particular year and except for the reserves in which it can impound them—the special reserves and general reserve—from year to year. And so he has to know at any point of time, when he lends us his good money—or the money of beneficiaries of trusts he administers—he has to know that there is not only a good prospect but almost a certainty, as far as those things can be calculated, that he is going to be paid back.

And so he must be sure that the Port Authority is not able to dilute the net revenue potential of the facilities to a point where the money that is going to come in—this gross revenue box that we start off with at the head of each column in the revenue flow chart—is going to get too small for the O&M and the debt service that it has to cover. He wants to be sure that we don't balloon the amount of our bonds up so big and get our debt service up so big and, in the case of a facility w'ch wouldn't be carrying itself, like a Hudson & Manhattan Railroad, even get its operation and maintenance expenses up so big, that there wouldn't be enough over-all to meet the debt service on his bonds and on the new bonds that might be put out in connection with new facilities.

1.3 Earnings Test

Now the mechanism by which this insurance was given was the 1.3 earnings test. All this test is is a requirement that the Port Authority will not issue new Consolidated Bonds unless it can show, at each point of time it proposes to issue new consolidated bonds, that certain earnings equal 130 per cent of, or 1.3 times certain debt service on certain bonds. For the most part, the earnings that are used in this equation are historical earnings. They are the best twelve months out of the previous thirty-six months and in practice these have always been the last year, which has always been our best year. In certain limited instances we can augment these historical earnings with some estimates, but for the most part you can think of the earnings that we have to use in this test as historical earnings.

On the other side of the equation is the debt service—that is the interest, the amortization on the bonds, the

annual maturities, the sinking fund requirements—which we must cover 1.3 times out of these earnings. This debt service is the requirement for that year in the future when our scheduled debt service will be at a maximum. In other words, we must take our peak demand year in the future for combined debt service on already-issued bonds and the proposed new bonds. We know our scheduled sinking fund and principal maturities; we know our scheduled interest requirements. We look up the schedule to figure out in which year in the future our scheduled debt service will be the heaviest, and then we compare this with our historical earnings, and if we can't show that the maximum future year's debt service requirements have been met historically in one of the past three years 1.3 times, we can't issue a Consolidated Bond.

For all practical purposes, that means we can't finance at all at that time. Theoretically, if a proposed new facility could be self-supporting, we might be able to work a financing like the old Series A, B, C, D, and E bonds without using Consolidated Bonds. But the things that the States direct the Port Authority to do these days are not capable of immediate self-support. So we are practically restricted to Consolidated Bonds, and that means we must satisfy the 1.3 earnings test.

We do have alternates in applying this 1.3 earnings test. First, we can meet it on a proposed new facility by itself. In other words, if a new facility which the Port Authority proposed to buy had historical earnings which were 1.3 times the debt service on the bonds we were proposing to put out to buy it, then even if every other facility was in financial trouble at the time, we could put Consolidated Bonds out to buy the new one because this would not dilute an existing coverage and the new facility would be carrying its own weight 1.3 times. This is a most unlikely situation, but it is provided for.

We have another alternate under which we can apply this 1.3 earnings test across the family of Consolidated Bond facilities. Now, the family of Consolidated Bond facilities consists of all those facilities which were financed only with Consolidated Bonds and not with the Series A, B, C, D, E, G&R, Air Terminal or Marine Terminal bonds. At the moment this family consists of the Hoboken, Elizabeth, Brooklyn, and Erie Basin Piers, and the two heliports. New facilities so financed would be added—such as the Hudson Tubes, and the new World Trade Center. If that family of facilities could show historical earnings 1.3 times the maximum future debt service requirements on all Consolidated Bonds, including those new ones proposed to be issued, we could put new Consolidated Bonds out to acquire a new Consolidated Bond facility that would be in that family. This alternative is not likely to happen for some years.

The real test, under which we have, in fact, done all of our Consolidated Bond financing to date, is the third test. This measures the financial picture of the entire group of Port Authority facilities—we call it the General Reserve Fund family because at the present time, aside from the commuter car program, every single Port Authority facility can legally contribute to and be supported by the General Reserve Fund.

Under this test, if we want to put out a new Consolidated Bond series, we must show as a practical matter that the historical earnings of all Port Authority facilities will cover at least 1.3 times the debt service we will have on all new bonds in that year in the future when our debt service will be at a maximum. Now that is a rigorous

requirement. We have met it easily in the past. But the entire program on which we are embarking contemplates that the coverages that we have produced will come down closer to the 1.3 times test figure—although never really near it, I hope, because with us 1.3 is absolute zero. At the point where we can only show barely 1.3 or a whisker under 1.3, we can't put out Consolidated Bonds. The 1.3 status is not prosperity to us; it is practically the point of enforced stagnation. It is the point at which our ability to finance any future projects, even any capital improvements to existing facilities, ceases. For the Port Authority to continue as a healthy, vigorous organization, doing the job it was set up to do and which it has done so well in the past, we must keep our coverages up as high as we can.

In order to issue our Consolidated Bonds in the first instance, it was necessary, of course, for us to close our General and Refunding bond, our Air Terminal bond, and our Marine Terminal bond issues. This was because it was from the surpluses to be produced by the existing facilities over the debt service on the old-line bonds that we were going to cover the debt service requirements on the Consolidated Bonds for years to come. If we were able to continue to put out increasing amounts of General and Refunding bonds, the Consolidated bondholder would have no certainty that any surplus revenues would be available for his bonds. So when we initiated the Consolidated Bond issue, we agreed with the Consolidated bondholders that we would no longer put out General and Refunding, or Air Terminal, or Marine Terminal bonds.

Revenue Flow

At the present time, then, the revenue flow in the case of Port Authority facilities is of two kinds. The existing flows

that we had for the old-line bonds still remain. The General and Refunding bond flow remains as long as there are any G&R bonds outstanding; the latest present maturity dates are well into the 1980's. And similarly, Air Terminal and Marine Terminal bonds flows will continue as long as any of those bonds remain outstanding. In addition, we have the flow for the new Consolidated Bond family.

Since 1952, we have used Consolidated Bonds as the sole medium of general financing. We've used them not only for financing the newer facilities—the Hoboken, Elizabeth, Brooklyn and Erie Basin Piers and the Heliports—but also for all the major capital improvements to the pre-existing facilities. We've used Consolidated Bonds to finance the Lincoln Tunnel Third Tube, the GWB Second Deck, NYIA enlargements, LaGuardia rehabilitation and everything else that we have done in the last nine years.

From the point of view of revenue flow, what is actually happening now is that these three older families of facilities —General and Refunding, Air Terminal, and Marine Terminal—are now covering their operation and maintenance, their debt service and their requirements to keep the General Reserve Fund full, with something left over for the three Special Reserve Funds; whereas the new Consolidated Bond facilities, if we thought of them as having to meet solely from their own revenues the debt service on *all* Consolidated Bonds, are deeply in the red.

Of course, this theoretical deficit had to be because the Second Deck of the GWB has been financed through Consolidated Bonds and yet *all* of the George Washington Bridge revenues must go into the G&R revenue flow line; the huge NYIA expansion program has been financed in large part with Consolidated Bonds, but all the revenues thus generated must go into the Air Terminal revenue flow line.

Exhibit V to Stipulation Among Counsel
Dated December 20, 1974

As a result, what we really have are downward flows from the old-line facilities into the General Reserve Fund and the Special Reserve Funds, and then a reverse flow back-up to take care of requirements for the Consolidated Bond facilities—to cover any O&M shortage and the shortage on debt service which must exist as long as the old-line bonds remain outstanding. At long last, sometime in the future, when all of these old-line bonds are retired, there will be only one revenue flow. All the facilities will then be in the enlarged Consolidated Bond family of facilities and their revenues will cover directly all related debt service.

The proposals that we be directed to take over railroad operations in both States would involve, without the New York subway system, something like $30 million of operating losses plus the debt service on bonds that we might have to issue to acquire the properties which produce this headache. These proposals made us take a good look at our financial structure to see to what extent, if at all, we were open to this kind of a financial raid at the sacrifice of the security that our bondholders had bargained for when they had loaned us hundreds of millions of dollars.

We actually found, as I have tried to indicate, that there was no hole in the structure, there was no pot of gold into which to dip. *All* the revenues were pledged to particular families of bonds; *all* of them had to be used either to pay the operating and maintenance expenses of the particular facilities or the debt service on particular bonds, or to keep the General Reserve Fund full, or for the Special Reserve Funds—and the Reserve Funds themselves were available only for things which would maintain or enhance the security of the bonds.

Certainly you could not make the claim that Reserve Fund expenditures would maintain or enhance the security

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Dated December 20, 1974

of our bonds if the money was to go outside of the P.A. family of facilities, as was proposed in one suggestion that we simply subsidize the private railroads to the extent of their commuter operating deficits.

However there still was a fear in the financial community that the Port Authority might somehow take *into* its General Reserve Fund family a group of deficit-ridden railroads and then, by having gotten the disease into our own financial body, be in a position legally to apply our monies to their operating and debt service deficits. The fear was that in some such way we might actually dilute our earning and reserve position to a point where we would no longer have the financial capacity to meet the requirements of the existing bonds and of any other bonds we might have to put out for our self-supporting projects.

We in the Law Department have always held the firm opinion that Port Authority *lacks* the power so to dilute the security of its bondholders, and we have advised the Commissioners to that effect. It would be just as ludicrous, to us, to suggest that the Port Authority could accept the New York City public school system as a gift and then, it being in our family of facilities, apply all of our revenues to paying teachers' salaries so there wouldn't be anything left to pay the principal and interest on our bonds. We knew we couldn't do that. However, the fears of the financial community were real, and so we felt that this legal opinion which we have should be codified in a form that would be not only a legal opinion, which could be disputed, but a firm written contract. And so we proposed what we call our Section 7 certification. Ever since the 12th series of our Consolidated Bonds, we have had in each series an agreement with our bondholders that we would not take on a new facility except under circumstances where our Commissioners could certify in good faith that it would not

Exhibit V to Stipulation Among Counsel
Dated December 20, 1974

unduly impair the sound credit standing of the Port Authority or the investment status of Consolidated Bonds. To us, this was merely a contractual codification of an agreement and obligation which we had anyhow, but it has helped to allay the fears of the financial community.

As for the future? I don't know . . . but I think you will see there is an intimate connection in Port Authority history between the financial structure and the direction we take.

The differences during 1961 between the State of New York and the State of New Jersey as to how the P.A. can provide some help in solving the railroad commuter problem have been for the most part differences as to the assurances which would be given to our bondholders. The statute which was first passed in the State of New York on the subject of the H&M also included the proposed World Trade Center. But our principal problem with that statute was that it did not provide certain assurances to bondholders which we considered essential to making the sound credit standing certifications that I described, and to holding the P.A.'s credit together and doing the job. The bill in New Jersey, which never was enacted, first started in that direction . . . but it too had some faults. The two States have not resolved their differences—and I hope they will. We're doing our best to bring them together but the only way in which they can successfully come together and keep the P.A. functioning as a worthwhile legal-financial institution is by giving our bondholders the assurances which they need for us to continue financing as we try to do the job*

* Since Mr. Goldberg presented this summary, the two States have reached agreement along the lines he discussed and the Hudson Tubes-World Trade Center legislation of 1962 contains adequate assurances to bondholders.

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Question by Mr. Tobin: "You might tell us more about the statutory assurances needed in any H&M legislation."

Mr. Goldberg: The assurances which we have suggested be placed in the statutes which would authorize us to do the H&M job are, as we propose them, in the form of an actual contract between the two States and the holders of our bonds. Contracts of this type can be made and cannot be breached by subsequent legislatures. This is because the Constitution of the United States says that no State shall impair the obligations of a contract. It is our opinion, concurred in by our present bond counsel and by his predecessor, and not challenged by anyone, that the contract we propose, if inserted in the legislation, would be binding and would constitute an unbreachable contract by the States.

Now that contract would be an agreement that the P.A. would not be permitted or directed to apply its General Reserve Fund monies to a new commuter railroad after the H&M except under stated circumstances. (It is the General Reserve Fund that we're trying to protect here. If a proposal can be done outside the General Reserve Fund structure, we don't have a problem of preserving credit.) The agreement would be that, before we put out bonds or in any way commit the General Reserve Fund to any application to the deficits of any commuter railroad facilities, the P.A. Commissioners would have to make a formal certification. The certification would be that the estimated deficits after operation and maintenance and debt service requirements of the proposed new commuter railroad facility would not exceed a certain figure. The figure may be thought of generally as one-tenth of the amount in the General Reserve Fund at the time, provided it is full.

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At the present time, we have some $65 million in the General Reserve Fund, and it is full, which means we have a debt of some $650 million. Ten per cent of that $65 million—or $6½ million—would thus be the limiting figure at the present moment, if such a certification had to be made.

That $6½ million would be used in this way . . . after acquisition of the H&M. We have estimated that the H&M will drain from reserves about $5 million a year over and above its own revenue take—so that at the present there would be a margin of $1½ million between that $5 million estimated deficit and the $6½ million figure which is 10 per cent of the $65 million in the General Reserve Fund. As long as those figures prevailed, we could not take an additional commuter railroad into the General Reserve Fund family if its estimated annual deficits exceeded the $1½ million margin.

Now assuming an agreement between the two States which gets the H&M into the General Reserve Fund family —and assuming this covenant limiting inroads on the General Reserve Fund were enacted by the two States—suppose it were then proposed that we undertake the enlargement of the H&M, or maybe that we take over some additional commuter railroad facility. At that time, we would take whatever the established H&M deficit was, we'd project over the next ten years our estimate of what that deficit would average and then add our estimate of the projected ten year average deficit on the proposed new commuter railroad facility, and we'd have a total. On the other side of the test equation, we'd take 10 per cent of our then General Reserve Fund figure, and if 10 per cent of our General Reserve Fund figure would cover our estimated annual deficit on the now-grouped H&M plus additional commuter railroad facilities, we could take the proposed additional

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facility into the General Reserve Fund family. Otherwise we couldn't.

After we first proposed this test formula, it was suggested that it was unduly rigid because, theoretically—or even actually, but not in the foreseeable future—our debt would some day decline and as our debt declined, the General Reserve Fund which is based on 10 per cent of the debt would also decline . . . and yet our revenues might not only remain constant but increase, so that our ability to take on commuter railroad facilities might be greater while our test figure was going down. We acknowledged this might eventuate and so we tried to meet that possibility by proposing an alternative under which the test figure based on one-tenth of our General Reserve Fund would be augmented by one per cent of our equity. By "equity" we meant debt retired from income or reserves. This covers a "someday and maybe" situation. It has been our final proposal. It is in the last draft of the bill which our office produced (and is part of the latest New Jersey bill to be introduced on the subject).

If enacted, it would produce a result which we could live with because, as we now know, the financial community will accept it. We know that to be so because we have canvassed critical investor opinion on the subject.*

* Final enactment along these lines was accomplished in 1962.

Excerpts from Testimony of John F. Thompson

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[2] Mr. Meyner: This is a hearing in order to procure testimony with reference to reliance and the effect on the secondary market by reason of the repeal of the 1962 covenant by the 1974 statute. T 2-16 to 2-20.

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[18] Q. What has been the nature of your employment with the Morton Company? A. I am vice-president. I am the head of a very small department which we call credit and finance. I have done a good deal of work of the firm in helping to structure new issues of some of the state agencies and authorities which the Morton Company is particularly a manager in the underwriting of.

I have also been responsible for describing and explaining credits of all sorts of municipal issues, not only to our salesmen but to customers of our salesmen both in conversation and in written memoranda which are circulated to both the salesmen and the customers.

[19] Q. Describe more specifically the operation of Morton and Company and your role in its operation. A. The Morton and Company is an underwriter and dealer specifically in municipal bonds. We do not have any other business at this time except for a small amount of Federal Agency sales on their new issues, but our specific business is municipal bonds.

In the underwriting of municipal bonds the Morton Company has what it called a major position in many of the syndicates which underwrite large issues. In quite a number the Morton Company is a manager of the syndicates. We have been a manager in part of Port Authority financing, the firm has in the period beginning 1964 and during the period 1967-1968 when the Port Authority issues were first increased to the size of $100 million each and sold. By

negotiation the Morton firm was one of four managing underwriters in the business.

We also deal in the secondary market, feeling that a good dealer is prepared to make markets in the issues which he has sold to customers, and also is prepared to buy holdings from a customer in the course of distributing in a new issue. The distribution of a new issue in the primary market and the purchase and sales in the secondary are often related in this way.

[20] Q. But what is the underwriting liability that Morton and Company undertakes? A. Last year we participated I believe in some four billion of new issues, and our underwriting liability was somewhere around 225 to 250 million in the course of the year.

Q. How many offices does Morton and Company have? A. The Morton and Company operates from just one office. We do a nationwide business but from one office.

Q. How would you characterize the nature of the customers dealt with by Morton and Company? A. The customers dealt with by our firm are largely what are known in the trade as institutional customers, by which we mean commercial banks, life insurance companies, trust departments of commercial banks, investment counsel firms, and the municipal bond funds. T 18-8 to 20-18.

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[21] Q. Have you been involved, Mr. Thompson, with any professional associations with regard to your operation? A. Yes, with quite a number. Early or after I came to Morton and Company I was put on the Investment Bankers Association Special Research, and spent a good deal of time in the ensuing year in working on the problem of defending the tax exempt market in the face of the drive for what was known as tax reform in Washington.

Excerpts from Testimony of John F. Thompson

And I am now Chairman of the Research Committee of the Public Finance Council of the Securities Industry Association, which is the successor to the old IBA or Investment Bankers Association.

I am a member and past President of the Society of Municipal Analysts, which is a nationwide group with some selected twenty-five or thirty members, professionals in the municipal bond business, particularly attuned to the credit side of the business.

I am a member and past President of the Municipal Forum of New York. I for a considerable number of years [22] was a member of the former Mayor Lindsay's Fiscal Advisory Committee, and I was a member of the Twentieth Century Fund Task Force that did a study of the rating agencies and the rating problem which eventually was published under the title of the rating.

Q. Did that latter publication cover municipal bond ratings or only corporate bond ratings, or both? A. Solely municipal bond ratings.

Mr. Landis: I submit Mr. Thompson as an expert and offer him for cross-examination on his expertise.

Mr. Sovern: We have no question.

The Court: You may proceed. T 21-6 to 22-13.

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[26] Q. What are the different types of municipal bonds that are commonly dealt with? A. Well, classification is done in varying ways in different places, but I think we can say that they are principally four types.

First is the general obligation tax-supported bonds, such as the general obligation of the State of New Jersey [27] or the State of New York or the City of New York, or of any of the cities here.

Excerpts from Testimony of John F. Thompson

The second type of obligation is a special obligation payable only from certain specific taxes. Some states have issued highway bonds payable solely from the proceeds of highway revenues which include the gasoline and motor vehicle taxes.

The third type, and this is the type in which the Port Authority bonds fall, is the revenue bonds payable solely from revenues received from the projects operated by either the Authority or the municipality, if it's water revenue bonds issued by a municipality and so on.

There's a fourth group that has come into prominence in the last few years. They are in part at least revenue bonds. That is, there is a revenue source and a flow of funds provided for the bonds but it was felt in issuing them that some stronger security should be given and a device was set up in which a reserve fund was established either by the issuing bond or by—from the proceeds of the bond equal to one year's interest and principal payment.

Then the state of issuance, these are largely state obligations. The state of issuance, by statute, provided that the state should reimburse the reserve fund if it had to be drawn upon in case other funds were inadequate to pay principal and interest.

[28] One can call these reserve makeup clause bonds. In the market, they are commonly called moral obligations. This is a term which has some disadvantages but it is a term that is generally used to describe this type of bond.

Principally, because the State as such cannot be compelled to restore the balance in the reserve fund, but has indicated through legislation that it will in case of need.

Q. Are they— these latter category of bonds, are they common in the states of New York and New Jersey? A. Yes. They started in the state of New York and there must be, oh, at least five billion bonds of that sort outstand-

ing in the state of New York, perhaps a little more now. They started with the Housing Finance Agency. The same reserve provision was given to the Urban Development Corporation, the Battery Park City Authority and I believe some others.

In the state of New Jersey there is this sort of a provision in the New Jersey Mortgage Authority or Housing Authority, whichever it is called here, that is an agency to assist in the mortgage market. This feature was also belatedly added to the Sports Complex bonds before they were sold.

Q. In the four categories, is there any question as to where among the four types of bonds the Port Authority consolidated bonds come down? [29] A. No question at all. They are revenue bonds. They have no state backup, moral obligation or anything of that sort. They are supported purely by the revenues from the projects which they have undertaken.

Q. Aren't they also supported by reserves? A. Well, the reserves, yes, of course. They are supported by the reserves but I guess the reason I said they were purely revenue, the reserves were all created from the revenues historically. That's where the reserves came from.

Q. Now, generally, Mr. Thompson, has there been an increase in the amount of municipal bonds sold over the years? A. Oh, yes, a very large increase. If we go back to 1948, the total sold was somewhere around two and a half billion including a little over a half a billion of revenue bonds. Last year the—there were 22,800,000,000 municipal bonds sold of which I believe 9,700,000,000 were revenue bonds or some 42-odd percent were revenue bonds. This, by the way, is not the total dimension of the tax exempt or municipal market because there is also the sale of notes in

large volume and actually last year 28 billion of tax exempt notes were sold. T 26-19 to 29-23.

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[30] Q. Could you discuss briefly, please, the ratings of municipal bonds? A. There are two recognized rating services, Moody's and Standard and Poor's. Each of them now rates the credit of an issue when a new issue is sold and charges a fee for so doing. There are four investment grade ratings which Moody states as Triple A, Double A, Single A, and BAA, and Standard and Poor's, the same down to the A., and then Triple B. These are all regarded as of investment quality and in none of those is it anticipated that default is likely to occur. The higher ratings are given [31] to qualities of credit where the margin of protection for future payment is larger and in the case of the Triple A, it is at some sort of a maximum.

There are ratings below those that I've stated. Most of them dealing with either bonds that are apt to be in default or that are considered highly speculative. I believe the BA and the Double B, they regard simply as highly speculative. Below that you begin to get toward default. T 30-15 to 31-9.

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[35] Q. What is the so-called "secondary market" in municipal bonds? A. The secondary market is a market in which present holders of bonds are able to resell their holdings and the secondary market has become very much larger in recent years because many investors are looking upon bond investments as a more active sort of a business, if a new issue comes into the market which seems especially attractive to them and they can sell one of their former holdings at what they think is a full or adequate price,

they will sell a former holding into the secondary market and buy the new issue.

Sometimes, the secondary market, of course, is used simply to obtain funds, if an institution or an individual wants to liquidate their holdings and use the money for another purpose. T35-4 to 35-19.

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[36] Q. How is the market structured in terms of buyers and sellers and intermediaries? A. The dealer firms consist of a commercial bank dealers department, dealers who specialize in municipals or who have the Municipal Department as a part of their overall security base and brokers.

There are, oh, a half a dozen or so brokers who act as intermediaries between dealers and they form a growing part of the market because some of those brokers have wires to all major dealers' offices and one way is if someone wants to sell a municipal holding, this is spoken of as getting somebody to put it on the penny wire and it goes to all dealers and in this way you are sure of getting the best bid because the offering is known to more people.

Q. In fact, are there a number of dealers in the municipal bond market? [37] A. There are a great many dealers. The dealer business centers, of course, in the New York financial community, but there are other centers in Chicago, San Francisco and some degree in Boston and there are dealers in almost all of the major and submajor cities in the country who do quite an active business in their local areas. [38] Q. Is the secondary market a competitive market? A. It is an exceedingly competitive market. As I indicated the Penny Wire helps to make it more competitive. No investor sells bonds these days without making sure that various firms have a chance to compete for the bonds.

Q. What is the pricing structure of that competition? A. Municipal bonds are generally sold on a yield basis, to yield a certain amount to maturity or to the first call date if that is the appropriate term to figure.

There are some that are priced on what is called a dollar bond basis, which really is not dollars but is a percentage of par. For example, if one of the outstanding bond issues were said to be priced at 85, it would mean that the buyer, if that were the bid for them, the buyer would be willing to pay $850 per thousand dollars of face value.

Q. And in fact when they quote and price yields are they calculated in fractions or in what manner? In other words, what are the differences in the calculation of yields when bonds are purchased on the secondary market—sold and purchased on the secondary market? A. Generally the market is stated in the basis points and segments of five basis points. That is, the bid will [39] be six twenty-five let's say, or six thirty-five for a certain issue to yield that much.

Q. What are those basis points? A. A basis point is one-one hundredths of one percent.

Q. Would an issuer of municipal bonds ever purchase bonds for its own account in the secondary market? A. Yes, especially if they had to [purchase] bonds outstanding [for] a required sinking fund; and many issues do, including most of the Port Authority issues.

And the sinking fund is set up in a way that requires the retirement of a fixed amount of bonds each year in order that by maturity the whole issue will be paid off. Now if the market is below the level and the interest rates are at a higher level than they were when the issue was sold, the issuer can go into the market and buy the bonds at a discount to its advantage. So this is always done.

Excerpts from Testimony of John F. Thompson

This is an advantage not only to the issuer; it is an advantage to the holder of the bonds because the sinking fund activity is a help to the market for his bonds. T36-9 to 39-19.

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[40] Q. In the municipal bond market what are the objectives of an investor? T 40-16 to 40-17.

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[41] A. The purpose of investors in investing in municipal bonds is to get the best yield they can relative to quality of the bonds. They are not simply buying something to be put away and the coupons clipped and the bonds to be paid at maturity.

They are looking to something that will cause a favorable relationship of yield to quality, maintaining its relative position in the marketplace. And this I think is the objective of most bond investors particularly the professional investment people and institutions. T 41-1 to 41-10.

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[42] Q. Would you explain perhaps with a little more detail the difference between a dealer and a broker in the secondary market in municipal bonds? A. Yes. A dealer in buying bonds either in a secondary or the primary market buys them for his own account and takes the risk that he will be able to sell them to an investor at a price which will afford him some profit and at least not involve him in a loss.

The broker, on the other hand, acts—works on a small commission and at no time do the bonds—are the bonds in the ownership of the broker. He doesn't have an inventory problem as most dealers have had particularly in the last year up until a month or so ago. It's been a serious one. T 42-5 to 42-17.

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Excerpts from Testimony of John F. Thompson

[43] Q. In your employment at Morton & Company and earlier at Scutter Stevens, have you had any dealings in the Port Authority bond secondary market? A. Yes. And several specific ones in my years at Scutter which I well remember.

On two different occasions through my recommendations [44] and advice and actually I think I made the contact with the dealers who then offered the bonds, over a million dollars each was purchased for the clients of Scutter, Stevens and Clark.

Q. And at the Morton & Company what would your involvement be in the secondary market? A. Well, my involvement in the secondary market is keeping in constant touch with the trading desk and the salesmen who are all involved in it as well as being asked from time to time for an opinion on the credit of something that's offered in the secondary market.

The credit judgment being a thing that is left to my responsibility in considerable part.

Q. Is it the practice at the Morton & Company to refer from time to time to credit rating reports prepared by independent credit rating agencies, and I show you P-1 and P-2 in reference to that question?

Would you identify P-1 and P-2, Mr. Thompson? A. Yes.

Q. And then answer the question if you can recall it. If not, I'll restate it. A. These are municipal credit reports prepared by Dunn & Bradstreet which then prepared reports independently of the later merger with Moody's. The question I—

Q. The question was, was it the practice and has [45] it been the practice—was it the practice at the time those reports were issued and has it been the practice at Morton & Company to refer to reports of that nature? A. Yes. It's

Excerpts from Testimony of John F. Thompson

always been the practice at Morton & Company to use the credit services of Dunn & Bradstreet and to refer to these in arriving at their judgments on the credits.

Q. And more specifically, how are they used? How are these papers, such as P1 and P-2 used? A. Well, they're used in providing information about the credit for those who are about to make the bid if it is a bidding situation; for salesmen, if they're discussing the credit with investor customers.

Q. Mr. Thompson, review, if you will, the situation with regard to the financial condition of commuter rail facilities in the Port district in the early 1960's as you understand it. T 43-20 to 45-17.

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[46] A. The situation in mass transit in those years was such that most facilities of this sort were operating at deficits. The Hudson & Manhattan Tubes which later became PATH were at that time bankrupt. There was a general recognition, I think, that the pressures on mass transit to keep fares down and the upward pressures on expenditures through union demands and threats of strikes were especially—were especially conducive to continued deficit operations and to lack of confidence in this type of operation as a vehicle for investment.

Q. What—

The Court: When you say there was a general recognition, by whom?

The Witness: In the investment community, your Honor. I guess I intended to imply that.

The Court: All right.

[47] Q. What [projections] were being made for the future of rail mass transit at that time.

Excerpts from Testimony of John F. Thompson

Mr. Sovern: By whom, your Honor?

Q. What projections that came to your attention were being made and would you then also answer Mr. Sovern's question, by whom? A. Certainly, the projection for the H and M, you didn't have a projection, you had a bankruptcy. I think then in the investment community that any project[ion] of what would happen in the mass transit was that it could only operate at a deficit.

Q. Do you recall any specific projections, in other words, can you point to anything specific or are you speaking from your general recollection? A. I am speaking from my general knowledge at that time.

Q. And you mention specifically the Hudson and Manhattan. In 1961, did it come to your attention that the Port Authority was proposed to take over the Hudson and Manhattan? A. Yes, this was a discussion and a proposal which was very much in the news in those days.

Q. What was your reaction to that? A. Well, my reaction to the Port Authority getting into that or other mass transit was one of concern be- [48] cause the Port Authority has always gone into projects which it could reasonably ascertain that they would become self-supporting, at least within a period of a few years of development and this seemed to be a different tact for the Port Authority to start on. T 46-3 to 48-5.

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Q. Did you look on the step as the final step of the Port Authority towards mass transit, the final step of the Port Authority towards mass transit? A. No, I think in common with the investment view of most things, anticipation is a key factor and if one step were made into mass transit, the question arose in the minds of most participants in the

Excerpts from Testimony of John F. Thompson

investment community, what comes next, what other projects in mass transit will next be undertaken, or projects.

Q. And did you have specific concern of the [49] Port Authority in your work at that time? A. Certainly in this respect, yes. A concern that the Port Authority might be pulled away from the revenue producing type of undertaking which it had up until then, into things that would get it into difficulty.

Q. Were you specifically involved in making recommendations towards clients of your firm with regard to Port Authority bonds at that time? A. I am sure I was, yes. I am sure I was.

Q. And what prospect did you see at that time for bonds of the Port Authority, both new issue and, if you will, the bonds that had already been sold by the Port Authority? T 48-16 to 49-13.

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[50] The Court: Do you have any specific recollection of some definite time period in 1961 when you might have considered what the prospects were for the Port Authority bonds?

The Witness: I do not think I recall a specific time period that far back, your Honor. I do recall that in 1961, this whole concern was being discussed and there were the beginnings of a discussion of what became the 1962 covenant as a device to uphold the credit of the Port Authority, but I do not think I can pinpoint it down as to the specific dates.

The Court: All right.

Q. What did you see at that time as the prospect for the sale of Port Authority bonds if the Hudson and Manhattan was taken over by the Port Authority? A. Well, it depended on what sort of overall restrictions were put on a situation in that respect. We all knew that the move to take over the Hudson and Manhattan was at least politically related to the construction of the World Trade Center and it could therefore turn out to be an isolated instance, but there was concern that it might not be, and I think this is what [51] eventually developed in the convenant.

Excerpts from Testimony of John F. Thompson

Q. If there had been no covenant, what would have been the effect upon the bond market?

Mr. Sovern: Objection, your Honor, if there had been no covenant, there conceivably would have been all sorts of terms and conditions which would have varied and the question as[ks] for an abstract and speculative answer.

Mr. Landis: The question as[ks] for the witness's opinion, it is hypothetical, but I think it is appropriate for an expert.

Mr. Sovern: The effect, I submit, has to do with the failure to specify, if you will, the hypothesis. As the witness testified, hundreds of conditions go into deals of this character. If there had been no covenant, we don't know what Mr. Tobin might have said about the absence of a covenant.

Mr. Landis: I think that is appropriate for cross-examination and Mr. Sovern will have the opportunity—

The Court: I would like to have all of the fact[s] or assumed facts in the hypothetical set forth in the record. In other words, are you asking him to assume that all of the conditions [52] of the consolidated bond resolution, the General Funding Statutes, the reserves required to remain in effect; are you also asking him to assume that the Port Authority would be continued to be managed by the same personnel

with whom he had experience in evaluating over the years, et cetera, et cetera, and are you asking him to assume also that legislation had been [con]currently pas[sed] by both States authorizing the takeover of the Hudson and Manhattan and the construction of the World Trade Center without any other conditions being imposed?

Mr. Sovern: May I add one condition, your Honor, to submit for your consideration, it is that the Executive Director of the Port Authority in whom he had such confidence at the time, he said the covenant was necessary. Had it not been enacted, it is entirely possible he would have taken a different view, so some specification of the question as to what Mr. Tobin was advising the community on this hypothesis seems to be called for.

The Court: I think you really ought to expand upon the question that you have asked in order to give it any meaning and also so that he **[53]** knows exactly what you are asking for the purpose of his cross-examination.

Mr. Landis: I will be glad to rephrase the question.

[54] Q. Mr. Thompson, if the Port Authority had been directed to take over the Hudson and Manhattan and build the World Trade Center without the covenant restriction of further involvement in rail mass transit, but assuming all other things have been constant and as they are, what would be the prospect for subsequent Port Authority bond offerings after that legislation?

Mr. Sovern: Actually, your Honor, on that hypothesis we know the answer. The stipulation reveals

the Commissioners would have refused to issue the section 7 certification, and that offering would have had to be renegotiated again on some other term.

Mr. Landis: Your Honor I submit we do not know the answer from the stipulation. I think there was speculation and representations made, but the question never reached the Commissioners. They never had to vote on the question. And it is not stipulated that they did vote on the question. And I would ask that the question be answered.

The Court: I am not certain that the stipulation actually would cover the answer which he hopes to elicit from the witness. Maybe he will get it and maybe he won't.

Do you understand the question?

[55] The Witness: I think so your Honor.

The Court: Then I will overrule the objection. You may answer the question.

A. All other things remaining equal and the authorization for the PATH takeover and the World Trade Center without the covenant would have resulted in my opinion in a less favorable market for the Port Authority bonds and a higher interest for the Port Authority bonds.

Q. Again if you will, although maybe it is repetitive, what was the reason for your opinion? A. The possibility of massive deficit operations getting into the Port structure.

Q. And what you referred to as a possibility, in fact was that concern borne out over the years since 1961 in terms of the deficits of rail mass transit? A. It certainly has been. I think it can be stated to be a proposition with tremendous foresight. The deficit of PATH was estimated at the time to be about five million dollars a year. As I understand it, it is running five times that.

Excerpts from Testimony of John F. Thompson

The operating deficit of the New York City Transit System during the current year will be $450 million to which must be added if we are to compare it in this context some $160 million of debt service on transit bonds, for a total deficit of $610 million. That is just the [56] Transit System in New York.

And I think this indicates that the fears of the investment community were well taken. In transit you are constantly—as the Port Authority recently found when they hoped to increase the PATH fare to cut the deficit of PATH down a little; great pressure was put on them by the two governors not to do it. There is a type of pressure that is ever present in this mass transit business that just does not exist in other activities.

Q. Of course Mr. Thompson we all know that the Port Authority did in fact take on the Hudson and Manhattan, and the Port Authority did covenant the issuance of bonds in the '60s after 1962, and the interest rates in fact did reflect great faith in the Port Authority credit. How did that all come about? A. It came about by the adoption of the covenant by the two states in which they convenanted and agreed with each other and with the holders of all affected bonds, subject only to bond holders' consent for any change—and this is in the statute—that no deficit producing mass transit facilities would be undertaken save for certain permitted purposes; and those permitted purposes are measured by a fraction of the General Reserve Fund which today has already been exceeded by the deficit of PATH; that is the general reserve fund is 170 odd million, the [57] covenant would permit $17 million deficits, including PATH, for new projects, and the PATH deficit is in excess of that. So that there is no room there.

I think it was the result of this covenant not to go further in this field that upheld the credit and borrowing power of

Excerpts from Testimony of John F. Thompson

the Port Authority over these years, and that was its purpose. It was not to give some bounty to the bond holders. It was to uphold the borrowing power of the Port Authority as an agency of the two States for the enterprises which the two States had assigned to it. T 50-3 to 57-10.

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The Court: . . .

Do you know if anyone knew the terms of the covenant, aside from yourself?

[58] The Witness: Yes sir. And as far as investors are concerned, certainly the investors that were advised by Scutter, Stevens and Clark; but I can't say whether they in their own minds were acting on the basis of from my knowledge of the covenant. I remember very well in information meeting at the time I think of the first bond issue to be sold after the adoption of the covenant when this was explained not only to the dealers and underwriters, but to investor representatives, because I was then with Scutter, Stevens & Clark and was invited to this information meeting; and the covenant was explained in very great detail as something that investors could rely on and should rely on.

It was explained to them as a legally enforceable contract between the two States and themselves if they became bondholders.

And certainly the institutional investor had every opportunity to know about this; every offering statement, every official statement of the Port Authority since that time in the offering of bonds has contained a very well expressed explanation of the covenant and what it meant to the bondholder.

Sure there might be an investor somewhere [59] who bought a bond without knowing what he was doing. When I was at Scutter, Stevens we used to find out quite a few of those, because later they became clients and wondered what they had done.

But so far as the informed part of the investment community, and given the institutional basis of a large part of the municipal market, a large part of it is informed.

As far as the informed part of the investment community certainly they knew about the covenant and relied on it and were importuned to rely on it.

Mr. Sovern: Your Honor, I ask that the last sentence be stricken as a legal conclusion and unresponsive to the question.

The Court: I don't think it was a legal conclusion.

Mr. Sovern: That they relied on it.

The Court: I think he is expressing it as a factual statement, not legal conclusion, based upon his personal knowledge of his dealings with people in the investment community that bought these bonds. I assume that was the basis of the statement.

The Witness: Yes.

[60] Q. The speech you referred to, Mr. Thompson, that [was] made by Mr. Tobin, did you, in fact, obtain a copy of that in writing? A. Yes. I found that there was a copy retained through the years of that speech. When I asked my former associates at Scutter, Stevens and Clark to look in their files for things that related to this, and I found a copy of the speech which I know had been in my hands because the Port Authority had not put a date on the speech as it was printed and I pencilled in the date. I recognized my own handwriting of the date on that copy

of the speech and that speech, by the way, was made to a combined group of the Municipal Forum of New York, the Municipal Bond Club of New York and Municipal Bond Club of New Jersey which includes probably a thousand professionals in this business. T 57-23 to 60-15

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[61] Q. At the time that you have been testifying with regard to the 1961, 1962 period you have testified as to the speech by Mr. Tobin which has been introduced as P-36 and described by you as the transcript of that speech, was there discussion by parties other than the Port Authority at that time of the covenant and its meaning and its need [62] and meaning. Let me amend that. A. Well, I certainly remember a great deal of discussion within the investment community of this and what it meant and of the necessity for it.

Q. Well, perhaps it would be best to refresh ourselves to the interchange in the investment community that took place on a formal and informal basis.

There are trade associations, as I recall your testimony? A. Yes. The trade associations, the Municipal Forum, the Municipal Bond club, but, of course, people in one business come together in many ways.

They lunch together, they're on the phone together in making trades. These things get discussed in the course of the trade. There's a constant flow of information back and forth that when I was at Scutter and was doing some of the buying, there were several dozen salesmen that would call me from time to time and these things would have been discussed back and forth with them. There's a constant flow of information between the street and the investment community.

Q. So that when you say that the covenant, its need and its meaning were discussed in the community, are those

Excerpts from Testimony of John F. Thompson

the kind of communicating—communications means that you were referring to?

[63] A. Yes, also the covenent, of course, was discussed in reports like this Dunn & Bradstreet report, a credit report on the—T 61-20 to 63-3

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Q. Describe it by number. A. P-1 and P-2.

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A. These discuss the covenant and what it meant to the credit of the Port Authority.

Q. And— A. Also on the informal discussion, I spoke of this information meeting at which Austin Tobin made the basic presentation. The meeting was not just a formal sit-down meeting. It ended with an informal reception where people moved back and forth and around discussing the subject of the day and I well remember some of those discussions at the time.

[64] Q. And when the Port Authority bonds were sold subsequent to the adoption of the covenant do I understand your testimony to be that the Port itself made written representations with regard to the covenant?

Mr. Sovern: Objection, your Honor. There's been no such testimony and the question is leading.

Q. Did they, I'll rephrase the question. A. Yes. I think I stated in each official statement there was such a representation, very definitely.

The Court: Unless you're referring to some other written communication.

Q. You're referring to the official statement? A. Yes.

Q. For the identification in the record, a sample of the official statement has been marked in evidence in this stipulation.

Excerpts from Testimony of John F. Thompson

Perhaps it would be best if you would explain at this point, the nature and purpose of an official statement and perhaps some of the synonomous terms that are often used to describe it. A. Well, an official statement is the document which an issuing body presents to the investment community to fully describe the issue which they are about to offer and in so doing it, if it's a good official statement they fully describe their financial condition, they fully [65] describe the—either describe or refer to the statutes under which they're operating. If there are resolutions or ordinances which are in fact bond indentures, those are usually put in in full text, they were in the Port Authority official statements, occasionally they are summarized in some official statements that are done less completely. There are financial tables, there are indications of what the money is to be used for, the whole story about the financing is put into the official statement.

Q. What's the purpose of the official statement? A. The official statement is to inform the investment community about the forthcoming issue.

Q. And specifically with reference to purchases of bonds? A. Yes, as dealers in an important bond offering, as dealers we obtain and sent to our major investor customers, copy of the official statement. I might say, your Honor, from time to time, I've tried to write up a summary, so that some of the customers wouldn't have to go through the whole thing.

Q. They're fairly lengthy? A. Yes, an official statement can be [a] 50, 75 page document at times. A full letter-size. T 63-7 to 65-23.

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[67] Q. Getting back to the time in 1962 at the time of the adoption of the covenant, did the acquisition of PATH

change your understanding of the Port Authority's role in the understanding of the two states. A. It certainly was an entry by the Port Authority at the instance of the two states in a field they had not been in before and not an especially happy one. T 67-18 to 67-24.

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[69] Q. Were you familiar in 1962 with the projects and facilities that the Port Authority had undertaken prior to that time? A. I was.

Q. And what was the common thread through all those projects and facilities? A. The common thread was that each of these facilities, at least given a time of beginning and getting into operation, would be self supporting and would be able to support the debt incurred to build the facilities.

Q. Did the PATH signify a change in that? A. Yes, because the PATH anticipated a deficit from the start. T 69-13 to 69-25.

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[70] Q. Did the Port Authority prior to 1962 have other deficit facilities? A. Yes, from time to time, but I think most of those deficit facilities were in due course related to other facilities. I'm thinking of—my recollection, your Honor, goes back to when there were separate Port Authority issues for each of the Hudson River Crossings and my recollection is there were one or two of those where the amount earned was pretty thin related to the debt [service] but through the flow of reserve money, they were [71] taken care of. I think when the Port Authority went into the airport business there were probably some beginning deficits in the airport business, but overall the airports have worked out to operate profitably.

Q. Do you know of any specific project that the Port Authority went into with the prospect that it would over a

period of years operate for a long time at a deficit? A. Only the PATH.

Q. Are you aware of any other bond holder protections bearing upon the question of whether the Port Authority could get at that time, or the current time, get involved in other deficit facilities? A. I'm aware of I believe it's called—of the Section 7 requirement and also of the 1.3 coverage requirement to be qualified in the case of the issuance of additional bonds.

Q. And are there also reserves maintained? A. Oh, yes, the reserves, the general reserve fund was established by Port Authority resolution many years ago and it is maintained at an amount equal to 10 percent of the outstanding debt which, of course, is a strong feature of Port Authority bonds. There is also a Port Authority policy to keep total reserves equal to two years of debt reserves, I believe.

Q. In your opinion, do those tests and reserves [72] render the 1962 covenant superfluous in terms of bond holder protection? A. No, indeed.

Q. And would you explain that? A. Well, the 1962 covenant and its requirements, require more specific determinations by the commissioners, by the staff and the commissioners, as to the earnings or prospects of deficits involved and they are—well, in the case of the Section 7 requirement, the commissioners can simply rule or state their opinion that the requirement would not harm the holders of the outstanding debt. In the case of the 1.3 times [test], they are permitted estimates of future earnings to some degree as well as [of] the historical earnings. This is a test which might be complied with on the initiation of a deficit rail facility, and later be found to have not avoided deficits by any means as given the propensity of these deficits to greatly increase.

Excerpts from Testimony of John F. Thompson

The determinations which must be made under the covenant, I believe, are much more susceptible to active testing, by those looking at the Port Authority from the outside, and [give] those in the investment community a much more secure feeling about the future profitability of the Port Authority.

[73] Q. Are there any experiences with specific regard to the Port Authority that you would refer to—that when you say experiences, on comparable things? A. Well, the PATH deficit has turned out to be many times—it was estimated at about five million in the years when PATH was taken over and as I understand it, it is some five times that now.

Q. And with regard to the specific structure of the Port Authority and its place in the political realm, are there concerns? A. Yes. The Port Authority is the agent of the two states. They are from time to time susceptible to pressure from the governors and the legislatures of the two states and as I indicated earlier on the mass transit field, it's a field wide open to such pressures and that was indicated when the fare—when there was an attempt to raise the fare on PATH that I believe was passed by the entire Board of Commissioners and then was vetoed by the governors.

Q. Do you recall the nature of that veto? In other words, how it was effected in practice? A. As I understood it, the governors have submitted to them the minutes of the Board of Commisioners and they can veto an item in the minutes. This is my understanding of it.

Q. And, in fact, though, wasn't an application [74] actually made for a fare increase? A. Oh, yes. The application was made and it was submitted—the federal government gets into this, too.

The ICC was involved and the application was made to them and, as I recall it—and the fare increase was, I

Excerpts from Testimony of John F. Thompson

believe, adopted by the Board of Commissioners itself before it was vetoed.

Q. In fact, doesn't the covenant by its very language permit the Port Authority to involve itself in other deficit rail mass transit operations? A. It does within limits, yes, by its language and I believe that at the time it was adopted the limit was small because 10 percent of the general reserve fund then was somewhere around $7 million—yes—$7 million and it was estimated that PATH would incur a deficit of $5 million a year so that there was a little margin for another operation.

The covenant, of course, also permits mass transit operations that can be self supporting including—including support from the outside as it were.

Q. In that respect, how does it differ from the Section 7 test that you referred to before? A. Well, it's more—it's much more precise. It's based on calculations which have to be made.

The Court: Is that in the statute?

The Witness: Well, it's in the statute that the [75] deficit that is expected to be incurred cannot exceed the general reserve fund.

The Court: Yes, that part of the statute, but the statement which you just made that the certification that the facility would have to be self supporting is more precise as against—I would assume measured against the Section 7 certification? Is that in the statute?

The Witness: I don't know what you mean by more precise. T 70-16 to 75-10.

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[77] The Court: Okay. Before in your testimony I thought you had made the statement that

the certification required to be made by the commission[ers] under the terms of the covenant with respect to a self supporting facility was more precise than the certification that would have to be made under Section 7.

The Witness: Yes, yes.

The Court: Now, would you please explain that by comparing the terms of the Section 7 certification, if that's what it really is, as against the certification of the terms of, let's call it, the A part of the covenant.

The Witness: The Section 7 certification "Requires that the authority certify [at] the time of issuance of bonds for a new facility for the next ten years or during the life of the bonds, whichever shall be longer, in the light of its estimated expenditures; that it will not materially impair the sound credit standing of the authority or the investment status of consolidated bonds or the ability of the authority to fulfill its commitments."

Now, the covenant, without taking on an additional deficit, mass transit facilities in the [78] 1962 statute, sets up certain amounts which the deficit can reach. That's what I meant by precise.

This [Section 7] is all in general qualitative terms, "Materially impair the sound credit standing or the investment status of consolidated bonds or the ability of the Authority to fulfill its commitments." "Materially impair", I submit, is a phrase subject to considerable variation and interpretation particularly when it might be involved in a field where the political pressures are such as they are in the mass transit field or are such certainly as the investment community believes them to be in the mass transit field.

The Court: Now, would you compare that with the covenant requirement of the certification.

The Witness: The covenant is that they must certify that the project will, one, be self-supporting—

The Court: I'm only concerned with that portion of it.

The Witness: Including the debt service or that it will have a deficit which, combined with the—

The Court: I'm not concerned with that part—what I call the B part of the covenant's authorization of mass— rail mass transit facilities. The only language which I take it that you derive your [79] opinion as to the quality of the certification is that which begins "The Port Authority must determine that the proposed additional passenger railroad facility is self supporting"? Am I correct in that?

The Witness: Yes, but, of course, those of us that are professionals in the field read the statutes also, your Honor.

The Court: Well, I'm quoting the statute. T 77-2 to 79-8.

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Mr. Landis: You're talking about the deficit [80] that is expected to be incurred—

The Court: No, no. I'm talking about the definition of self supporting facilities.

The Witness: Well—

The Court: He said that there was a more precise standard or certification that was required than with respect to the certification required under Section 7.

The Witness: May I answer that further, your Honor?

Excerpts from Testimony of John T. Thompson

The Court: Well, taking a look at this—

Mr. Landis: Here is the exact language. This paragraph is what your Honor refers to, I assume.

The Court: I can't—

Mr. Landis: "And other railroad facilities shall be deemed to be self supporting as of the time".

The Court: Right.

Mr. Landis: If you want, Mr. Thompson can read it aloud and then we'll know exactly what he's—

The Court: No. He can read it to himself.

Mr. Landis: All right.

The Witness: Now, self supporting, your Honor —although it sounds as though it can be a qualitative [81] phrase is not, at least not in our business.

Self supporting means that the revenues shall be estimated to be at least as much as the operating expenses plus the debt service which is a mathematical requirement that does not appear in Section 7, which only requires certification that it will not materially impair and that's what I meant by more precise. T 79-25 to 81-8.

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Q. Now, specifically, Mr. Thompson, do you know whether the 1962 covenant was looked to in the purchase of Port Authority bonds since 1962? A. Oh, yes, very definitely. T 81-13 to 81-16.

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Q. Would you explain its relative importance since 1962 in the minds of purchasers of bonds? A. Its importance in the minds of purchasers of the bonds [82] has been that it prevented the Port Authority from getting into a massive project producing deficits in the mass transit field or several such projects.

Excerpts from Testimony of John F. Thompson

Q. And did you personally look to the covenant and depend on it? A. Oh, certainly. That was—that certainly was an important and significant part of what I presumed we were buying for our clients when we purchased those bonds that I speak of.

Q. Which were those, just to make sure it's clarified? A. This is when I was at Scutter and there were at least two instances where we purchased Port Authority bonds for several clients. In each instance, the total amount was at least a million dollars of bonds.

Q. If the covenant had not been enacted, would those purchases have been made?

Mr. Sovern: Objection, your Honor, for the same reasons as before. The other elements in the hypothesis have to be specified for a question like that.

Q. Assuming everything else to be equal, but if the covenant had not been enacted would those purchases have been made? A. Assuming everything else to be—

[83] Mr. Sovern: I'm sorry, your Honor. The question has to be with the recommended purchase, not whether they were—

The Court: Right.

Your role then was strictly as an advisor?

The Witness: Yes, yes. It was—I advised the transaction and after consultation with the client sometimes completed the transactions and that's the reason for—

The Court: Well, would you have recommended, then, the purchase of the bonds?

The Witness: I would not have recommended them at the price [at] which they were then offered. T 81-23 to 83-13.

Excerpts from Testimony of John F. Thompson

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[84/85] Q. Was there some regard given to the pattern already established by the Port Authority in evaluating the strength of the covenants? T 84/85-7 to 84/85-9.

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A. Your Honor my own opinion and those I associate with in the various professional capacities all felt that this was a binding covenant not only because of the way it was stated and the way it was presented, but also because of [86] certain past contracts that the States had entered into with Port Authority bond holders.

Now in the 1931 legislation there was an agreement by the two States that no competitive crossing with the Port Authority crossings be built within a certain distance from those crossings. And that was always regarded as part of the contract with the bond holders.

And it was so highly honored by the state of New York that when they built the Throughway they built the Throughway bridge, the Tappan Zee Bridge over the widest part of the Hudson River in compliance with that contract, which they and the State of New Jersey had jointly made with holders of Port Authority bonds.

Q. If you knew that the covenant would later be repealed would you have recommended the Port Authority bonds during the '60s? A. No.

Q. Is there some relationship with regard to that feeling to the moral obligation bonds of the two States? A. Well there very definitely is in the investment community. There is a strong feeling about this. Let me give you two examples, if I may your Honor.

The repeal of the covenant was recommended by the Governor of New Jersey approximately one week after sale of the $300 million Sports Complex issue. That issue was

Excerpts from Testimony of John F. Thompson

[87] saleable at the time only because the Legislature had added the so-called moral obligation to its commitment.

In my opinion—and I have heard no professional investment person who disagreed with this; in my opinion if that recommendation by the Governor had been made one week before the sale of the Sports Complex bonds instead of one week after, the bonds would not have been saleable; because the investment community was saying about the repeal of the covenant, and has said about it: If a legal covenant can be repealed by the States, what confidence can we place in their moral obligation?

We have run onto this in an even broader field. My firm was the number two manager in a syndicate which last week underwrote $150 million and sold them of Power Authority bonds of the State of New York.

Now the Power Authority is not dependent upon a moral obligation. It is dependent on its own revenues which are from the sale of electric power. It is about as far removed from any emotional, or as far removed from the feeling I just stated as anything could be. And yet we found in several parts of the country that there were many institutional investor portfolio managers who had themselves adopted or their investment committees had adopted a rule that there be no further investment in anything in New York State or New Jersey due to the repeal of the covenant.

[88] Q. Mr. Thompson, are there any Port Authority bonds in Morton and Company's ownership at the present time? A. None.

Q. In fact isn't it customary for Morton and Company to carry an inventory of municipal bonds of certain municipal buyers? A. Yes, we generally carry some inventory.

Q. What is the policy now with regard to Port Authority bonds? A. We have not had Port Authority in the inventory since the repeal of the covenant.

Excerpts from Testimony of John F. Thompson

Q. Prior to commencement of this litigation did you as part of your duties as vice-president of Morton and Company have occasion to prepare any papers analyzing possible Port Authority involvement in community rail mass transit? A. Yes.

Q. I show you P-3 and P-4 and ask you to describe those in the context of that question? A. P-4 was as noted at the top still in draft form. Some of the people with relation to my firm, especially Mr. Morton himself, have been influential in public affairs over the years. And he asked me to prepare something along the lines feeling that discussion of repeal of the covenant was coming, to prepare something along the lines of what [89] might possibly be done within the boundaries set by the covenant; and to review also the procedure for getting bond holder consent for changes.

In this draft I did this. This draft was being used only for internal discussion. And at some point in it I made some suggestions about an overriding toll on the tunnels and bridges, which later on my lawyer friends advised me was not possible for one reason—and I was even then suggesting that the States do this and not the Port Authority—but they advised me that there was an inter-State commerce constitutional question here, and that probably what I had suggested was not feasible. T 84/85-22 to 89-12.

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Q. Mr. Thompson I believe you described one document. I believe you said, while it was a draft, it was never committed to any further form. [90] A. That is correct, it was never committed to further form. In early 1974 when this, actually after the Governor of New Jersey recommended repeal, and the recommendation of repeal by the Governor of New Jersey was a striking event to the investment community—I almost used the word shocking—for the reason

Excerpts from Testimony of John F. Thompson

that years ago when repeal was attempted, it was Governor Cahill of New Jersey who said: No, there is a contract there and we won't do it. So when this Governor of New Jersey recommended repeal it was a considerable shock to the investment community.

And I was asked to write up something in an attempt to be useful in persuading those in power that repeal should not be undertaken. And the memorandum described as P-3 is the memorandum which resulted from that effort.

> The Court: Well, the then Governor of New York was also advocating repeal and had recommended it several times, and indeed the New York Legislature had already passed a repeal.
>
> The Witness: In 1972.
>
> The Court: Yes.
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> The Witness: That is what I mean when I say Governor Cahill was the one who stopped it two years ago.
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> The Court: Was the investment community equally shocked when the then Governor of New York advocated a repeal and the New York Legislature [91] actually voted a repeal?
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> The Witness: I think to say equal shock would be unfair your Honor. Let me see if I can explain it. When Rockefeller signed the repeal in 1972 he issued a statement which in its terms was very conciliatory. It had words in it like: I shall be conferring with the Governor of New Jersey to try to work out something here that will not impair the credit of the Port Authority. It was a less final thing.
>
> I agree, it was after that that Governor Cahill definitely decided he would not go along. I won't say there was not shock in the investment community; there was. And the reason I mentioned this

later event is that once the Governor of New Jersey was, from the investment community's point of view the one who stopped it, then to have a new Governor of New Jersey say I recommend it, this is the event I referred to as somewhat of a shock to the investment community.

Q. Mr. Thompson you have indicated shock in February of 1974. But isn't it true in his campaign in 1973 Mr. Byrne at that time mentioned the fact that he intended to repeal the covenant? A. It very likely is. I don't recall—not being a [92] resident of New Jersey I did not follow the campaign as closely as some. It is one thing to make statements in a campaign, if I may say so, and another to come out with a formal recommendation, because there often is leeway.

The Court: Maybe that is why you were shocked because the politicians kept [this promise].

The Witness: I had not thought of it that way your Honor.

Q. What in your opinion has been the effect on the Port Authority's secondary market as a result of the repeal? When I say the Port Authority's secondary market I refer of course to the secondary market in Port Authority bonds. I am using a shorthand term. A. Yes, to be sure. And there had not been a primary market since then because they had not sold a bond issue. The market has been adversely affected by the repeal. It is not possible to measure the adverse effect simply by comparing market prices I believe.

There was a time before the repeal when Port Authority bonds traded in the market very much as some of the other

Authorities, major Authorities of State bonds do. And if a bank or insurance company with a five million dollar holding of those bonds came to a dealer and said: I want to sell these; what will you bid? He could get a bid that would be pretty much in line with the quoted market.

[93] What we have now is a market that is unusually thin because present holders are not willing to sell. Most of them have been advised by their portfolio managers or their professional advisors to hold on and see what develops here. Most of them believe that the covenant is protected by the Impairment Clause of the Constitution.

Mr. Sovern: I move that that sentence be stricken. He does not know what most of them believe.

The Court: No; I think you really ought to qualify it.

A. I will qualify it and say all of the professional investors I know and have talked to believe that the covenant is protected by the Impairment Clause of the Constitution. Consequently they do not want to sell at a sacrifice. This I believe was the position taken by United States Trust Company after they [launched] this lawsuit.

I have been asked by a number of our customers what my advice is at this time. And I have given the same advice, to hold on.

As a consequence the flow of bonds into the market is much much less than it normally would be.

You could get a flow into the market by one of two things. One would be a brand new issue coming into the market. The other would be some investor who decided not [94] to go along with this type of advice, but to sell his five or ten million dollar holdings. In my opinion in

either one of those events the bid for the bonds would be substantially below the market as it is quoted today.

Some of us have discussed the possibility of an interest rate on a new issue if one were to be sold, an—

Mr. Sovern: Your Honor I am going to object to this.

The Court: I will sustain the objection. T 89-23 to 94-9.

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[100] The Court: All he wants to do is get the witness to say it would cost the Port Authority more money today in interest to sell a bond with a repeal than it would without the repeal.

Mr. Sovern: He has testified to it twice.

The Court: I agree it might be repetitious, but that is all he wants to get him to say.

Is that your opinion?

The Witness: Yes, it would cost considerably more because of the repeal.

The Court: No matter what the purpose of the bond issue was?

The Witness: At this point, I would say—

The Court: How much of this is an emotional reaction to the shock which was experienced by the repeal and how much of it was based upon a sound intellectual analysis of the financial position of the Authority?

The Witness: I think the latter, your Honor, [101] but the sound intellectual analysis also has to include the fact of repeal and the fact that this litigation is not resolved and therefore if the Port were to come to the investment community with a new issue, they would have to present it and expect

to get a bid, assuming that the worst happens from the investment point of view.

Q. Will you explain the worst? A. The worst meaning the United States Trust Company does not win this suit.

Q. Going back, Mr. Thompson, to the point of time at which there was a very serious and active discussion of the repeal, a point of time which you identified as starting in February of 1974, have you kept track of the commentary in the investment community and the press with regard to that activity? A. Yes, in some detail.

Q. And in fact, did you involve yourself in your posture as a trade association representative in the process, the legislative process at that time . . . . T 100-6 to 101-20.

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[103] A. Yes. [As shown in] P-5, I was one of a group that conferred with Dr. Norman Hurd, who was a secretary or executive assistant to Governor Malcolm Wilson. I was there as President of the Municipal Forum of New York. Mr. Weeden, as representing the Municipal Bond Committee of the S.I.A. Mr. Pratt was there representing the New York Clearing House Banks; Mr. Beason representing the Dealer Bank Association and Mr. Putman was there as the representative of the New York Area Organization of the Securities Industry Association.

This letter was written after our conference, and as it states, after a conference of that sort, your Honor, you think of several things you wish you said. This letter was to do that.

The second letter to Chairman Ronan [P-14] was the third in a series. I had written a letter to the New York Times which was published, I believe, in early May, urging

that the covenant not be repealed and urging the disadvantages to everyone and everything concerned, including any help the Port might give mass transit.

The letter was answered by Chairman Ronan and P-14 is my response to him. His response was also published in the Times. At that point, I determined I should respond to him but that the public discussion had [104] gone on long enough and I simply wrote this letter to further state the case to him personally. T 103-2 to 104-2.

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[115] Q. Have you had occasion since the repeal of the covenant to also discuss the matter with investors as distinguished from other members of the investment community? A. Yes, yes. I've discussed it with some of our customers at the request of the salesmen who ordinarily cover them, as the expression goes in the trade.

Q. And have you given them advice in response to requests? A. Some of them have asked what do you think, what—should we hold on to the Port bonds we own? Should we buy more at this time? I've given them the advice that I would hold on for the reasons that I stated earlier and I will repeat now—

Q. It's not necessary unless the Judge—

The Court: No, no. He testified as to that.

Q. —requests it. We have it on the record.

And with regard to—you said you also gave them advice with regard to the—A. With regard—

Q. —with regard to the purchase? A. With regard to purchase I simply for the most part agreed with them that it wasn't a very wise thing to in effect buy into a lawsuit.

[116] Q. And did you recommend to your firm a position as regards the inventory of the bonds? A. Yes. I

recommended and I found the rest of the firm in complete agreement that we should not put Port bonds in inventory at this point because of having to be at risk in whatever we carry in inventory.

Q. In that regard, how would you characterize the Port Authority secondary bond market at the present time? A. Well, as I said earlier, the Port Authority secondary market is very thin at the present time and the supply of bonds coming into the market is much smaller than it has been in the past or than it is for other authorities in the state system. T 115-2 to 116-13.

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Q. Do you have an opinion as to the effect of the United States Trust Company lawsuit that is being heard here today on the secondary market for Port Authority bonds? A. Yes, I think the lawsuit filed immediately by the U.S. Trust Company had a very sustaining effect on the market in that it indicated to bondholders that their interests [117] were being actively protected and seen to and that if it hadn't been for that, the market probably would have been —would have been worse and it would have moved lower than it has. I think that's had a sustaining effect.

Q. Now, with regard to the specific comparison of Port Authority bonds to other bonds of other agencies, municipal agencies, during the period in question, I would like to show you a series of exhibits which—I'm sorry—not a series but two exhibits.

Specifically P-89 and P-90. These are the ones that you know as the—T 116-20 to 117-11.

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Q. Two bonds are reflected there, are they not? For the record, would you indicate those bonds? A. The bonds are the Port Authority of New York and [118] New Jersey, 6

percent bonds of February 1, 2006, and the Massachusetts Port Authority, 6 percent bonds due July 1, 2011. The bonds are comparable as to coupon rate and both are long maturity so they are comparable [as] to maturity.

Q. Mr. Thompson, going back for a moment, before going on with this specific chart, you previously testified as to what a dollar bond was. Is it true that these are both dollar bonds? A. Yes. These are both traded in the market on a dollar basis which means a percentage of par value.

Q. Is that what's shown in the left-hand—A. That's what's shown on the left-hand margin.

For example, when this hits, when one of these lines hits 85, it means that the market would pay $850 for $1,000 par value of bonds.

Q. And in the market what does the bid price mean? A. The bid price is the price offered by a buyer or a prospective buyer. It—sometimes a bid and asked quotations are obtained which doesn't necessary fully reflect the impact of the market but I gather that this is an accurate portrayal of the bid side of the market for these two issues.

Q. I show you an exhibit which has been marked P-93. Do you understand that to be the source of the bid prices?

[119] A. Yes. This is my understanding that the prices for the Port Authority 6's were from Weeden & Company and the Massachusetts Port Authority are the prices from Clifford Drake.

Q. Are those reliable sources? A. Yes.

Q. Now, would you, before going on to the specific question that we touched on before, the comparability of these two issues, would you describe the Massachusetts Port Authority as you know it? A. Well, the Massachusetts Port Authority like the Port Authority here, operates the airport. They also—they don't have the numerous toll

facilities that this Port Authority has, but they do have one of the leading ones in it—what used to be the Mystic Bridge so that their business is in the same sort of revenue producing projects that the Port of New York Authority—Port Authority of New York and New Jersey is in.

[120] Q. What geographical area are they in? A. The Boston metropolitan area.

Q. And now with specific reference to the two issues shown on P-89 and the bid prices which are listed on P-90, what other similar and if any, dissimilar characteristics of the two issues are there? T 117-23 to 120-7.

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Q. The two issues that are specifically listed. One I say "issues," two bond issues? A. The two issues have the same credit rating by their rating agencies, and as I said earlier, they are similar in other respects.

Q. In the marketplace, would the 006 and 011 maturities be considered similar? A. Yes, because when 006 is out over 30 years and when you get beyond 30 years' maturity, the change in price for a change in yield, does not vary very much from there on out. So they would both sell as long-term issues and be quite comparable.

Q. Could you describe the intrinsic security behind the two issues? A. Well, the intrinsic security is the revenues [121] of the projects managed and other aspects of financial security, both of which are involved in the A rating.

Q. Do you find that these two issues are comparable in all characteristics that you feel are important? A. Yes.

Q. And how about the external factors other than the characteristics to which you have testified, market factors and the like, are they comparable or are they subject to the same internal factors in that regard? A. Well, they are each subject to external factors reflected in their own

Excerpts from Testimony of John F. Thompson

states, in their own locale, so they might either track together or vary as they have here.

Q. Would you characterize the relationship as demonstrated here between the bid prices of the two issues from July of 1973 to April of 1974? A. Yes, during that period, the two issues, in price, practically tracked each other. The line crossed on occasion. T 120-10 to 121-22.

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[127] Q. How would you characterize the relationship from April, '74, to December, '74? A. There was a growing spread betwen the two bonds which was unusual compared to their past history as shown.

Q. What factors changed at or during the period in question? A. The fact that changed was the repeal of the 1962 covenant by the two Legislatures and signed by the Governor.

Q. Were there any other changed facts that you know of? A. Not that I know of, no.

Q. Do you have an opinion as to the impact of that fact on the prices as demonstrated on the chart? [128] A. Yes, in my opinion, the spreading out of the two markets was due to the repeal of the covenant.

The Court: Wouldn't it also be due to the opinions expressed by persons such as yourself and their recommendations not to purchase Port Authority bonds?

The Witness: I think our recommendations not to sell are much more important, your Honor, because there were no new issues coming into the market so that a purchase recommendation was not as appropriate as it would be if they were a new issue. The recommendation to hold on, I think, had much more impact on the market.

Excerpts from Testimony of John F. Thompson

Q. What was that impact? A. To sustain the market.

Q. For which? A. For the bonds of the Port Authority of New York and New Jersey.

Q. In other words, the red line as shown on the chart would deepen even lower? A. If the market were confronted with large volume sales of bonds of the Port Authority of New York and New Jersey, in my opinion, the Port bonds would dip considerably further. T 127-10 to 128-25.

[130] Q. What does the chart show from the pattern from July, '73, to April, '74, P-91, I am referring to, for the record? A. It shows the same pattern as the other, that they track through that period.

Q. And what does P-91 show from April, 1974, through December, 1974? A. It shows the same spreading out, showing that the Port Authority of New York and New Jersey bonds suffered more in the market during that period.

Q. What conclusion does P-91 and, of course, P-89 tend to support? A. It supports a conclusion that even with a limited market in supply which has not fully reflected the bad effects of the repeal because of lack of volume, but even the limited market shows that the Port Authority bonds had been adversely affected by the repeal. T 130-1 to 130-18.

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Cross-Examination by Mr. Sovern:

[131] Q. Mr. Thompson, you testified, I believe, that you know of no other reason for the Port to behave as the chart reflects other than the passage of repeal by the two Legislatures and the signatures by the Governors. Is that correct? A. Yes, sir. T 131-19 to 131-25.

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Excerpts from Testimony of John F. Thompson

[132] Q. If you know of any other facts, would you state them now, please, Mr. Thompson. A. No, I don't know of any other facts or causes.

Q. Thank you. If you look at Plaintiff's exhibit 92, you'll see that the—T 132-13 to 132-17.

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Q. —from July 19 to August 23, the price was—the spread was four to five and a half points—

The Court: You're talking about 1974?
Mr. Sovern: Yes.
The Court: July 19 to—
Mr. Sovern: August 23.

[133] Q. Throughout that period the prices were relatively constant, varying 5, 5½, 5, 5½, 5½. I believe it's accurate to say it was only either 5 or 5½.

Why did it go to 8 on August 30 and still spread further in the weeks immediately following? A. I don't think one can pinpoint that sort of thing, sir. The best answer I can give would be that it was a gradual cumulative effect of recognition of what had happened.

Q. In other words, there was no recognition between July 19 and August 23— A. I didn't say there was no recognition. I said a gradually cumulative effect.

Q. Are you familiar with the story in the *Wall Street Journal* dated August 15, 1974, headed "World Trade Center Is Far Behind Plans For Filling Offices"? A. I probably have seen it, yes. T 132-20 to 133-17.

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[134] Mr. Sovern: We are marking as State's exhibit 1—well, I better give you this copy—we're marking as State's exhibit 1 the *Wall Street Journal*

Excerpts from Testimony of John T. Thompson

story dated August 15, 1974, which says, "World Trade Center Is Far Behind Plans for Filling Offices." Plaintiffs have a copy of this it [135] was produced from their files, your Honor.

The Court: Is there any objection?

Mr. Landis: Your Honor, I assume that this is done with the exact same stipulation that was placed on the newspaper articles that were offered by the Plaintiff in this case; that is, not to be considered as proof of the facts indicated in the article.

Mr. Sovern: I entirely agree with that. We're cross-examining about causes of price decline.

The Court: All right.

S-1 into evidence. T 134-20 to 135-12.

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[136] The Court: In any event, looking at S-1, do you recall having seen that article either in part or in its entirety?

The Witness: Yes, I think I saw it at the time, your Honor.

[137] Q. Well, would it have affected the price of the Port bonds? A. I would doubt it very much. The development of the World Trade Center has been a very gradual sort of thing. The investment community has been aware of slowdowns from time to time, of increases in the capital cost. And I don't think that the article covers anything striking enough to have any impact on the market. Certainly I heard no discussion of it in that respect at the time.

Q. You don't think it would distress bondholders to know that 40 percent of the space is unleased?

Excerpts from Testimony of John F. Thompson

Mr. Landis: I object to that. Again we are getting—

The Court: He is not offering it for the truth of that statement; but would a bondholder be affected if he saw such a statement in a publication such as the *Wall Street Journal*?

Mr. Landis: The way you ask the question is fine. That is what is assumed in the question, because we are operating on the stipulation that the facts that are stated in the article are not necessarily true.

[138] A. With that stipulation, your Honor, may I also answer that the sentence does not say that it is 40 percent unleased. It says about 22 percent of the entire complex. 40 percent of the commercial space is still unleased.

Q. That's correct. A. The rest of it is being paid for in rentals just as well as the commercial space.

Q. Would that trouble the bondholders?

The Court: In his opinion.

Q. In your opinion. A. In my opinion, it would not, because I suspect that there is close to 22 percent of the space that is not fully completed yet. I think the renting and the completion of the space is fairly well parallel. I think most institutional investors have gotten to the point where a news article alone does not frighten them.

Q. Do you know the present investment of the Port Authority in the World Trade Center? A. I know in a general way that it is around 750 million dollars or thereabouts.

Q. If I told you later figures showed it to be 800 million, I take it you would not find fault with this? [139] A. No, I won't quarrel with that. T 136-5 to 139-1.

Excerpts from Testimony of John F. Thompson

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Q. You recall the original estimate of the cost of the World Trade Center? A. I believe the original estimate was around 350 million dollars.

Q. If I told you it was 250 million dollars would you find that— A. No. I have seen that figure in some of the things that I have been reading if I am just not sure that wasn't the figure before it actually got started, that is preliminary figure, that one perhaps shouldn't fairly go back to.

Q. For the time being, let's take this: 350 million dollars originally projected, not preliminary, currently at 800 million, and the story says it is 22 percent unleased, bondholders unconcerned? A. I have already commented on the story. The rise in costs, I'm sure that some of the renting of the space must be tied to the rise in costs. That is generally the case.

Q. You have no other explanation for the increased drop in Port's at the end of August? A. No other explanation than the repeal of the [140] covenant, no.

Q. That's correct. Take a look at P-92 again, and you will see that in mid-October, 1974, the spread [closed] again, apparently.

The Court: P-92?

Mr. Sovern: Mid-October, 1974, P-92, the same chart we were just looking at.

The Court: Mid-October, that's right.

Q. The spread closed to 4. How would you account for that, Mr. Thompson, if the increase in the spread in August was the product of the delayed reaction of the repeal, why did the spread contract in October? A. I don't think one can pinpoint from week to week or month to month moves

in markets and exhibit them to any particular cause; over a long sweep, one can.

Q. You did attribute it to a cause. A. Over a longer sweep I did attribute it to a cause, yes, sir.

Q. You cannot account for the fact that the spread closed to 4 in mid-October? A. No. There are very often temporary influences that come into markets that have very little to do with developments; that have to do with somebody [141] for some particular reason being in the market or withdrawing a sale or something of the sort. It is not necessarily the result of developments. Markets do not work like computers.

Q. How temporary do you have in mind, daily, weekly, monthly or annually? A. Certainly a period of time such as represented by the widening of the spread here indicates something but—

Q. The spread closed to 4 on P-92, on October 18. And you know—that means it could conceivably have closed to 4 on October 12. This is the first date it is dated for, October 25. It was 4½ on November 1. That is a minimum period of three weeks at which it had closed to 4. Can you explain that? A. I have no particular explanation for, as I say, relatively short-term movements in the market. I don't think one can tie to those.

Q. You will notice the spread opened again in November 15, it is at 11. Can you explain that? A. No, I would not attempt, as I say, to explain these shorter term movements.

Q. That is still attributable to the repeal in June—Governor Wilson's signature in [142] June, Governor Byrne's signature on April 30 and the legislative actions on those signatures are still having their effect on the widening spread in November after contraction in October and having earlier had these other movements—that is your testimony? A. I think that is true as nearly as we can ascertain it, yes.

Q. What is the most significant factor working in the municipal bond market at this time and over the last year?

The Court: The most significant factor affecting prices?

Mr. Sovern: Yes.

Mr. Landis: Is this generally?

Mr. Sovern: Yes, generally.

A. At the present time the most significant factor is the reverse of what it was up until December or thereabouts in 1974.

Q. The bond market was generally depressed? A. Yes. T 139-4 to 142-20.

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[143] Q. I take it the municipal market like other bond markets were significantly depressed like all other markets in 1974. A. Yes. That is the reason the lines go downward. If the municipal bond market had been relatively firm the change in Port Authority prices would have been much easier to show than it is.

Q. The main determinate of the trend is a downward trend that was affecting all issues of this character, meaning municipal bonds. A. I suppose we could put it into figures here saying that the movement in the black line down to somewhere between 75 to 80 represented that, and the rest of the move of the red lines represented the Port Authority repeal.

Q. That is what I am trying to find out. That is your testimony. Would you come back to my question? You will recall it was your testimony that you could not account

for the increase in the spread to 11 on November 15. Do I accurately [144] state your testimony? A. Yes. I stated that.

Q. Have you seen the New York Times article dated November 10, 1974, and headed: Port Authority has fallen on hard times? A. Yes, I saw the article.

Q. Could that have had an effect on the price in November? Would you like to examine it? A. Yes.

The Court: I think it ought to be offered.

Mr. Sovern: This is marked as S-2 and offered in evidence.

The Court: Is there any objection?

Mr. Landis: Does the exact same limitation apply, your Honor.

The Court: To all of them, any newspaper article.

Mr. Landis: Not considered proof of the facts stated?

The Court: Not considered proof of the facts; unless there is a contrary statement at the time of offering.

Mr. Landis: Thank you, your Honor.

[145] The Court: I assume there are going to be some prices offered, quotations and the like.

Mr. Landis: We have already offered some.

The Court: These are abstracts.

Q. Do you recognize that article, Mr. Thompson? A. Yes, I remember that. T 143-6 to 145-9.

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[146] Q. Could it have affected the price? The price of New York Port Authority bonds? A. It is possible to some degree, but again I don't think there are many holders of Port Authority or other large agency bonds or

prospective buyers who depend on the news media for their information. Also I notice that this article includes among other things a discussion of the repeal of the covenant; so that again it was raising that question.

Q. Do you think that perhaps some bondholders, irrespective of whether they take their advice from the daily news—I apologize; that was [147] inadvertent, the *New York Times*, may fear that the price of their security will be affected by everyone else reading about it in the *New York Times*?

Is that news in the newspaper a fact or factor that an investment advisor takes into account in deciding whether to buy, hold or sell? A. I would say probably only to the extent that he finds that it is proved in the lower market price and he knows better than to have—

Q. Would you say that this was proved in the lower market price? A. I just wouldn't say, because I have never related these two things specifically.

Q. Isn't this article a little strong for financial reporting, Mr. Thompson? I call your attention to the assertion that the Port Authority is at something of a low point in its long career. As one Commissioner of the Authority said, it is dead in the water. T 146-14 to 147-19.

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[149] Q. . . . Perhaps I should read several, then if you can tell me whether you share my sense that those are strong words to describe a sense of security.

The third paragraph, "Deterioration of the huge agency attributed this statement to officials and commissioners of the Port Authority, the deterioration of the huge agency may be more serious than anyone had previously imagined. The principal problem facing the agency is its inability to sell bonds or borrow money."

Excerpts from Testimony of John F. Thompson

Would you say those statements bothered a bondholder? A. Well, can we go on after that?

[150] Q. Anything you would like to read. A. "A bondholder's suit has scared off potential lenders and underwriters."

This is one of those types of newspaper reporting where the reporter stands on his intellectual head. This is nonsense. Bondholder's suit did not scare off potential lenders. The repeal of the covenant scared them off and just because Frank Prial does not know that and does not write in the *New York Times,* does not matter a darn to investors.

Q. Mr. Thompson, we don't hold you to the knowledge of the fine points of evidence.

The story is not being used to establish that these statements are true, but that Frank Prial of the *Times* made them and presumably a million people read them, some of them Port Authority bondholders.

Now, you added a sentence to a number of others I read and there are more to come.

Would they frighten a bondholder? A. I would not think that any professional investor in Port Authority bonds, and the Port Authority bonds are widely held in institution and investment accounts, I would not think any [151] professional investment manager would be influenced or get his facts from a newspaper article, and, as a matter of fact, I would think that most of them would get about as far as the passage which I just read back to you, and then say, "Well, this guy doesn't know what he is talking about anyway, forget it."

Q. Did you read this story through to the end when you saw it in the *New York Times*? A. I probably did because I am professionally concerned with all those sort of thing, but I did not read it with any feeling that I was being informed.

Excerpts from Testimony of John F. Thompson

Q. Why did you keep all those clippings to which I objected before in your file? A. Most of them dealt with events. This is what the newspapers call "analytical" reporting or news analysis or something like that. Sometimes they mark it as that.

Q. Let's go on.

In the next paragraph, following the one from which you read, "Some of the impressive facilities of the Port Authority have stopped making money or in some cases never started."

That sounds like the description of an event or series of events to me.

[152] Would that concern bondholders? A. If bondholders obtained information to that effect from reliable sources, from reports by the Port Authority or from the credit agencies or someone to whom they look for reliable information, it might affect them, but I am not at all sure they would be bothered by a newspaper reporter saying it.

Q. You are not at all sure they would be bothered, but it is possible? A. Well, it is barely possible that the most uninformed might be.

Q. The next paragraph says that it is assumed—

> The Court: Before we go further along this line, what percentage of the Port Authority bonds of series such as that which is reported on P-92, the 2008, what percentage would be held by individual investors, let's say, up to the $50,000 category as against the institutional investor?
>
> The Witness: Your Honor, anything I said in response to that would really be a guess.
>
> The Court: I realize that, but based [153] on your experience and knowledge in the underwriting of these issues.

The Witness: I think a larger proportion would be in institutional hands, and I might say that many individuals who would own these Port Authority bonds or own other tax-exempt bonds, really have their accounts professionally managed by bank trust companies or by investment counselling or investment advisors of other types, so that I would think a very large proportion, one way or the other, would be under professional guidance.

The Court: With such a thin market for these bonds as you have described it after the repeal of the covenant, wouldn't the offer of a relatively small quantity of bonds have a greater effect upon the price than would otherwise be the case?

The Witness: I suspect that is true, yes.

The Court: In other words, an article such as this if published, would not have to reach necessarily the institutional investors and have them act upon it, but if a number [154] of individual investors had read it and decided that they should sell, that could have a pronounced effect, given the condition of the market as you have described it?

The Witness: Most of those individual investors who were even without professional investment advice in the sense that they paid a fee for it or something of this sort, most of them, I think would talk to their own dealers from whom they bought the bonds before they arrived at a decision like that. They would have to say, "What do you think of this article, what do you suggest doing?"

I spend a great deal of time calming down fires from articles on a number of things, not necessarily the Port Authority, but somebody asked one of our

salesman, "What about this article on UDC," or something of that sort, and then I have to read it and give them some interpretation of it in terms of what I can find out about the actual situation.

Q. You say you spend a fair amount of time calming down fires when there are adverse press reports.

Are you always successful? [155] A. Generally.

Q. In your opinion, do some investment advisors not choose to put out those fires? A. I don't know that I can answer for all investment advisors. None that I know of would fail to act responsibly.

Q. You would not expect, though, that all investment advisors would be one hundred percent in allaying bondholders concerns in the wake of a newspaper story that was highly damaging in the terms used, would you? A. I don't think I'd have any way of judging that, sir. T 149-12 to 155-13.

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[158] Q. I am asking you whether in your opinion bondholders would be concerned to read a *New York Times* story calling a Port Authority official, to be sure unidentified, as saying the World Trade Center is a white elephant? A. Of course, I can't answer that an absolute no. I have no idea what all bondholders might—any and every bondholder might think. Any bondholder that I know of or have had contact with, would, if he were concerned about that, call up somebody that he thought knew and ask him about it and that's about the size of it.

Q. What would he find out if he called up and asked somebody whether he thought the World Trade Center was a white elephant? A. Well, I was really pushing back to a place where some figures are given there. I don't think

Excerpts from Testimony of John F. Thompson

anybody buys and sells on phrases like "white elephant." [159] I hope not. T 158-8 to 159-1.

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[160] Q. So your opinion is that this *New York Times* story of November 10, 1974, had no discernible impact on the Port Authority bond prices? A. It had none that I could identify or know about.

[161] Mr. Sovern: I'm sorry.

The Court: Are you saying the article as a whole?

Mr. Sovern: The article as a whole and in its various allegations.

The Court: Because I thought you had testified before that with reference to the article as a whole that it could possibly [have] affected the price to some degree but you weren't prepared to say how much.

Mr. Landis: Well, that wasn't the question that he asked. He asked, would you testify that it has no discernible impact and he said no, none that I can identify, and I think before he just allowed that the possibility existed.

The Court: All right.

The Witness: I believe that is the difference in the two answers. I hope they're not inconsistent.

The Court: No, they may not be.

Mr. Sovern: I'm sorry. I'm absolutely confused.

By Mr. Sovern:

Q. I understood your testimony to be that this article had no discernible impact on the price of the Port Authority bonds—[162] A. So far as I can indentify.

Q. And you cannot account for the growth in the spread of price between Port Authority bonds and Mass Ports to

Excerpts from Testimony of John F. Thompson

11 on November 15? A. Not in any particluar—not by any particular event, no.

Q. And that's because the short term swings are not instructive—how long a trend line do you need before you can effectively identify a cause of a growth in price spread? A. I don't know that I can state a fixed rule on that but—

Q. Give me a range; year, three months? A. When it gets to six or eight months as this appears to be, then I think you have a trend. T 160-22 to 162-15.

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[163] Q. Let's take May 10. What was the spread on May 10, 1974? T 163-8 to 163-9.

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A. Shows five points.

Q. Now, May 10, I take it, you understand followed the passage of the New Jersey legislation and signature by Governor Byrne and the passage of the New York legislation but not yet the signature by Governor Wilson, correct? A. Yes, I believe that's correct.

Q. So the five point spread, I take it, [164] Governor Wilson's signature should have an effect on the spread that would aggrevate it over the long term? A. Well, markets are just not that automatic, sir. T 163-18 to 164-3.

• • •

[165] Q. On May 10, the spread between the bonds was five points. On May 10, Governor Byrne had signed the legislation—had already signed the legislation passed in New Jersey's legislature and both Houses in New York had passed the repeal and Governor Wilson had not yet signed it.

On your analysis and in your opinion I would anticipate that the signature by Governor Wilson would aggravate

the spread. Am I correct in this? A. If market[s] acted automatically on events, yes, but markets act on anticipation a great deal of time.

Q. So, in other words, Governor Wilson's signature might not have adversely affected the spread? A. If it were already anticipated, it might not.

Q. Governor Wilson, then, would reduce the spread? A. Definitely not.

Q. No. Do you know what the spread is today, seven months after Governor Wilson's signature between the two bonds referred to in P-92?

The Court: You mean today?

Mr. Sovern. Today—yesterday, actually, your Honor; today's *Times.*

A. Well, newspaper quotations?

Q. Yes. [166] A. I wouldn't take that as an accurate reflection of markets.

The Court: Well, do you happen to know yourself—

The Witness: No, I don't know, your Honor.

The Court: Do you have the newspaper

Mr. Sovern: It's three points your Honor.

[167] Mr. Landis: Well, Your Honor, the witness—

Mr. Sovern: Rather than offer the *New York Times,* I would like to do this, Your Honor. It seems to me that you recall that I asked in voire dire and Your Honor expressed a preference to have me raise question about these charts on cross. It is now clear to me that—

First of all, the failure to bring them down to date is a gross deficiency making it impossible for you or

any other tribunal reviewing this record to make an accurate record of the effect so I move at this time—I move at this time to strike the chart in supporting that.

The Court: Well, I might be disposed to make some comment on them if you can show me what the history of this spread has been since the terminal date on the chart.

Mr. Sovern: I respectfully—we have—

The Court: I mean, I'd be very frank to say that if these are chopped off at a certain date and then the subsequent history shows that the spread has narrowed so that it's no longer significant, then I would be inclined to say that the credibility of these charts to prove anything that the witness has been testifying about would be seriously undermined. T 165-3 to 167-25.

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[170] Mr. Laulicht: For the record, S-3 will be a two-page chart headed 1975 for the New York-New Jersey Ports, 6 per cent, 2008 and the [171] Massachusetts Ports, 6 per cent, 2011 covering the period January 3 through 23.

Mr. Sovern: I think the question I [put] to the witness is, are you familiar with the current—the January price spread between Massachusetts Ports and New York Port Authority bonds?

The Court: Then take a look at this particular document and see if it corresponds to your knowledge of what the prices have been for those issues during the month of January.

The Witness: The latest figures seems to be reasonably consistent with what I have observed in the market.

Excerpts from Testimony of John F. Thompson

The Court: The figures reported on S-3?
The Witness: Yes. T 170-23 to 171-15.

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[172] By Mr. Sovern:

Q. Now, you'll notice, Mr. Thompson, these numbers go down only to January 23rd; that, of course, is due to the time in which they were prepared.

You'll recall I asked you for the spread on May 10, 1974, before Governor Wilson's signature and you answered that the spread was five. Can you tell me what the spread was on January 23 in light of S-3? A. Yes. The spread is five that day. T 172-1 to 172-9.

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[178] Q. Do I accurately recapitulate your testimony, Mr. Thompson? You cannot account for short term changes in the spread between New York Ports and Massachusetts Ports. A. That is correct.

Q. Now as to the long term trend from May 10, 1974 to January 23, 1975 there is no change in the spread between those two bonds, is that correct? A. It happens that there is no change between those [179] two dates. But that does not necessarily show that it is a long term trend. There can be short term things happening in January which account for what happened in January.

Q. I asked you earlier, Mr. Thompson, what is the long term trend, and you told me seven or eight months so I picked the period that I thought met your specifications. A. One does not approach these things with academic rules. One judges them by experience and by what happens over a period of time. Taking the long term trend that is shown, sure, back in late October they came together for a time there too. Then they spread out again. We could very

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well be in a period just such as that now, where temporarily they pull together for the time being. I don't think that you can say that you establish a long term trend by picking the dates which give you the result you want. T 178-17 to 179-17.

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[180] The Court: Wouldn't it be fair to say, Mr. Thompson, that the selection of December 14 for [181] the purpose of preparing these two charts then might have been an arbitrary selection?

Mr. Landis: That was just the day that it was made, Your Honor.

The Court: Isn't that an arbitrary date then?

Mr. Landis: It was made at that point in time. They had asked us for the exhibit and we gave it to them.

The Court: I understood the witness to say, and I understood you to be re-enforcing his testimony, that if you just pick two dates, that that would not necessarily show a long term trend, because there might have been something else going on at that particular time which would affect the spread between the two bonds.

Mr. Landis: Yes.

The Court: It so happens that these charts that were prepared by you on December 14 also happen to coincide so far as the evidence I have before me now is concerned, with the maximum spread between the two bonds. And he has now shown evidence that subsequent to this date, this spread narrowed considerably.

Would you encompass what has happened after December 14 through February 3 of 1975 within the

Excerpts from Testimony of John F. Thompson

[182] long term trend? Which I take it is a period of some approximately seven weeks.

The Witness: Your Honor, when the long term trend has shown this widening over a period of some six, seven or eight months, and then narrows again in the course of one month or five weeks, this may not be conclusive as to what comes next.

The Court: We would be able to make a lot of money if it were conclusive.

The Witness: We would, and it could be somebody lost a lot of money. It could be somebody sold short through here and then covered in January.

The Court: All I am suggesting to you is this: If this chart—and I am taking 91 as the example—if this chart were continued out through February 3, 1975 showing a gradual narrowing of the spread throughout the rest of December, January and through February 3; would you say that that is deemed to be part of the long term trend with respect to the spread between these two bonds?

The Witness: No.

Mr. Landis: I think he has answered the question.

The Witness: I would be hesitant because of these other points that this has happened before, [183] Your Honor. May I point out, that, suppose for the sake of argument we accept the five point spread—incidentally, I looked up during the recess, my trade desk gave me a bid price of 82 on the Port of New York rather than 83 which is used in the paper here.

But if we take a five point spread and look back to when this all started, when there was practically no spread, that five points applied to at least a billion of Port Authority bonds issued under the

Excerpts from Testimony of John F. Thompson

covenant and amounts to 50 million dollars. That is quite a tidy sum. T 180-24 to 183-12.

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Q. Let me try it this way: Do you think these charts as amplified by the down to date material, reflect the impact of Governor Wilson's signature of repeal on the difference in prices between New York Ports and Massachusetts Ports? A. I don't think Governor Wilson's signature of repeal can be taken here as one sole event. T 183-18 to 183-24.

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[184] A. It is the sequence of events. And the whole process of repeal is reflected here. T 184-3 to 184-4.

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Q. Do I take it correctly that your answer is no that the charts cannot reflect that? . . . T 184-14 to 184-15.

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Reflect Governor Wilson's signature. T 184-23 to 184-24.

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[185] A. I think, counselor, that your view of relations of markets to events is much too automatic.

Mr. Sovern: I am asking you for your opinion.

Mr. Meyner: It is his opinion.

A. It is not a question on which I would feel that one knowledgeable in markets could give an opinion.

Q. Then the charts do not reflect it. If you gave me an opinion—A. The charts are not supposed to reflect one event. T 185-8 to 185-16.

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[188] Q. Do you have an opinion on the basis of the exhibits dealing with the prices of Massachusetts Port

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Authority and New York Port Authority, all of the exhibits, dealing with that subject, do you have an opinion as to whether the spread between the New York Port's and the Massachusetts Port's was affected by Governor Wilson's signature of the repeal legislation? A. Was it affected? Now, you have left out of the question the current spread. I think Governor Wilson's repeal was one of the events in the course of repeal which affected the general trend of the market, yes. T 188-5 to 188-17.

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[189] Mr. Sovern: The witness has declined to answer the question, whether the exhibits you have introduced as amplified by the exhibits we have introduced permit him to have an opinion as to whether the spread between these two bonds was affected by the signature of Governor Wilson.

I recall that on direct testimony, he said he knew of only, of no other facts that would spread the market except repeal by the two Legislatures and signature by the Governors. That was the testimony and I am cross-examining as to whether he has— T 189-1 to 189-13.

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Q. Now, we are asking you about one of the only facts that you thought had an effect on the price and I am asking you whether you wish to change your testimony in that respect. A. No, I do not wish to change my testimony.

Q. Then do you have an opinion as to the effect of Governor Wilson's signature on the spread in price between the Massachusetts Port bonds and the New York Port bonds? T 189-17 to 189-25.

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[190] A. As I have stated, my opinion that relates repeal of the covenant to the market on Port Authority bonds combines the series of events which occurred in that and I do not think anyone professional in the market would try to tie a market trend to one of those events separated from others.

Mr. Sovern: Your Honor, I respectfully submit the question is susceptible of a yes or no. It asks whether he has an opinion and I respectfully ask—

The Court: Do I interpret your answer to be you do not have an opinion with respect to that particular event having such an impact on the market?

The Witness: Yes, I think it is fair to say that I do not have an opinion as to that particular event and I do not think that an opinion on that point is something that would be professionally looked upon as knowledgeable in the market. T 190-6 to 190-24.

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[211] Q. I call your attention to Page 1 of this D & B report [Exhibit P 1], Mr. Thompson. You'll find that this is the offering—this credit report is occasioned by the imminent sale of the 19th series? A. Yes.

Q. Did the 19th series contain a covenant? A. No, because the covenant had not then been passed by the two legislatures.

Q. Was a special premium paid by the Port Authority for the sale of the 19th series? A. Not so far as I know. It was a $25 million issue. It was not large in connection with the Port Authority financing.

Q. All right. Now, the Hudson-Manhattan legislation was introduced in New York and then cleared the second

Excerpts from Testimony of John F. Thompson

house of the New York legislature on March 25, 1961. Governor Rockefeller signed it on April 6, 1961. I stated that for background.

Would you expect the price of Port Authority bonds to be affected by this action during the period, let's say, from the beginning of March to the middle of [212] April? A. This is 1961 you're speaking about?

Q. 1961, the period during which you were concerned and I take it what you were concerned about was Governor Rockefeller's indication that he wanted Hudson & Manhattan picked up by the Port Authority. A. And your question again is?

Q. Would you expect this—I wouldn't—would you expect the legislature's actions and Governor Rockefeller's signature of the legislation requiring—directing the Port Authority to take over the Hudson and Manhattan without a covenant—this is 1961—not [1962]—would you expect that legislation to have affected the price of the bond? A. I think probably not because this was a step along in the discussion and development situation.

Q. Okay. I call your attention now, Mr. Thompson, to P-4. This is the draft of your speech that I guess was never actually delivered as a speech. T 211-5 to 212-18.

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[213] A. Yes. It was not intended to be a speech. It was a draft for internal discussion purposes in considering the question of what some of us in the investment community could do to help in the situation where the Port was being pressed to take on more and more in mass transit and there was the covenant; to see whether there were ways of accommodating to the covenant and still doing something in mass transit.

Excerpts from Testimony of John F. Thompson

Q. And one of the ways you discussed was by possible bondholder consent to modification? A. I discussed bondholder consent, yes.

Q. And in your view a meeting of the holders of consolidated bonds would have had to be held in order to modify the covenant? T 213-1 to 213-14.

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A. This is not my opinion. This is what was provided [214] in the consolidated bond resolution.

Q. Is that—let me ask the question. It may be that Counsel may answer it.

We received these documents [with] some attachments or at least they seem to be together in the file; one of which was section—a Xerox copy of Section 16, the modification section. Is that the section to which you're referring? A. Yes. That I believe is attached to the copy I have here.

Q. Now, under that provision as you understand it, there would have to be a meeting of the bondholders. Would there have to be a quorum at that meeting? A. A quorum of 60 percent and any variation would have to be approved by the holders of 60 percent of the bonds then outstanding adjusted for anything that was in the sinking fund and all that sort of thing.

Q. I take it you were relying on Section 16b, would I be correct in that? A. It's been some time since I read this—

Q. Please take your time. A. —Counsellor.

Yes, I think so.

Q. Now, as you look at that provision, I take it that 40 percent of the bondholders may have their rights altered by 60 percent of the bondholders. Is that [215] correct? A. That's what's provided in the resolution, yes.

Q. Are there any exceptions to the extent to which the 60 percent vote may impair the obligation of the bonds being held by the other 40 percent?

Mr. Landis: Your Honor—

A. I would have to read it fully again but I'm sure one exception is that the interest rate can't be reduced or the maturity changed.

Q. Would you focus on the proviso of Paragraph B and if you read that perhaps that would be helpful. A. Just before the small "i" you mean?

Q. Yes. If you'd read that aloud. A. "Provided that no such amendment or repeal or modification shall alter or impair the obligation of the Authority which is absolute and unconditional to pay the principal and interest of any consolidated bond at the time and place and at the rate or amount and in the medium of payment prescribed therein without the express consent of the holder of such bond."

Q. So that there are several promises made by the Port Authority that cannot be taken away from the bondholders. Is that correct? A. Yes. This is customary in this sort of provision.

Q. In any event, it was your opinion that the [216] approach to the bondholders would fail. Is that correct? A. Yes. Certainly, unless some very substantial quid pro quo were offered and none has ever been suggested.

Q. The way you put it, as I recall—not as I recall it, as I read it is that even if the approach were made with a moderate increase in the interest rate, it would be unacceptable. A. With a moderate increase I then believed that it would be unacceptable and I still do.

Q. Now, you stated— A. A moderate increase being—I was thinking of the Triboro thing where it was a quarter

of one percent, perhaps half of one percent. I'll define moderate for you. T 213-1 to 216-13.

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Q. Now, as you told us, this draft was an effort to find the way to deal with mass transit without repeal of the covenant. You explored one track, modification, found that likely to be unavailable.

[217] You then offered another alternative, did you not, on Page 4, second paragraph—second full paragraph? A. Well, this is the proposal—the tentative proposal which all of this was being a draft memo, you can understand, of an override toll enacted by the two states, not by the Port Authority and I went on to qualify this somewhat because at that time I felt that that increase in the toll might reduce the traffic and that that might really impair the bondholders' rights to the normal increase in traffic and that therefore some of that should go to them, but this was all a tentative notion which came to naught.

Q. Were you concerned that the security of the bondholders would be damaged by your proposal? A. I was trying to figure out something where it would not be damaging.

Q. You stated on direct that you were subsequently advised that this posed problems of interstate commerce and possible Constitutional objections. Who gave you that advice? A. Well, some of it—some of the municipal bond counsel that I know and have talked to so many of them that going back, I'm not sure which ones.

Q. This was informal rather than retained counsel? A. Oh, yes. This was an informal discussion. T 216-22 to 217-25.

[220] Q. Your letter to the *Times* has a similar proposal. A. Somewhat, broadened.

Excerpts from Testimony of John F. Thompson

Q. Was that because you got some advice and decided to be vague about it? I'll ask the question. Was the difference between this document and the *New York Times* letter attributable to your receiving such advice? A. Not entirely. It is attributable in part to thinking about this proposal for a couple more years and trying to mature my thoughts, and realizing for one thing, that the concern, which is to get some money here, is apt to be for the New York Subway System, and any idea that you could do something like that with a tax only on the crossing between here and Manhattan and without touching the other entries into Manhattan would be ridiculous, and I'm sure any Governor of New Jersey would soon find it so. T 220-1 to 220-17.

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[221] Q. You say in your draft that your plan could be accomplished within the present framework in covenants with the bond holders. Is that correct? A. I then thought so, yes.

Q. Do you now think so? A. There was some statement made then that indicated that there was a divergence of legal view on that, and I would have to respond simply that there was a difference of opinion on that point.

Q. You testified at some length as to the meaning and the effect of the 1962 covenant.

> Mr. Landis: Your Honor, I don't think that is correct. I object. He testified as to his understanding, not—I don't think he purported to be an expert on the meaning, and we did not offer him as such with respect—he testified that the salesmen and others relied on his interpretation of the covenant, and he testified as to how and in what respects; it was more precise than Section 7 of the bond resolution.

Excerpts from Testimony of John F. Thompson

> The Court: I don't think we need to get too far into that, but I will permit you to ask the question.

Q. Doesn't your proposal violate the 1962 covenant, Mr. Thompson [222] A. Which proposal?

Q. Your proposal in P-4 beginning on page 4, the [toll] override. A. I have already said that that was the discussion proposition, that I had long since moved away from; I don't know whether it violates the covenant.

Q. You don't know whether it violates the covenant? Is that your testimony?

> The Court: He just said that.
> Mr. Landis: Yes, he just said that.

A. At the point of discussion of it, there was a difference of opinion. That is my answer.

Q. Is there still a difference of opinion as to the compatability of your proposal with the covenant? A. Counsellor, I regard that proposal as two to three years old and quite passe. I doubt if anybody else has thought of it in the last two and a half years.

Q. Do you know the date on your *New York Times* letter? May 1st, 1974, is that correct? A. I don't have it before me, but it probably is. T 221-1 to 222-20.

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[223] Q. I call your attention to the next to the last paragraph, the third sentence in which you say: "A broad view of urban and energy problems suggests that government should act to discourage auto traffic into major cities in favor of the greater use of mass transit. This would probably involve a sizable shifting of funds from charges imposed on automobile traffic to the support of mass transit. To do this is an exercise of the state police power, and

Excerpts from Testimony of John F. Thompson

should be done by the two states themselves and applied to all automobile traffic entering Manhattan." That is within the last two and a half years, is it not? A. Yes. That is not the proposal I made.

Q. Is this proposal compatible with the 1962 covenant? A. I think it could be so arranged, yes.

Q. How would you shift charges imposed upon automobile traffic crossing the Hudson from automobile traffic for the support of mass transit? A. I presume that would be part of it.

Q. How would you do it, consistent with the 1962 covenant? A. I think I have said that it was an exercise of the state police power; and the *Times* incidentally left out the phrase and taxing power that I had it in the letter that I [224] sent.

Q. I have seen that draft, and you accurately describe it. A. It seems to me that it is up to the states to take action here under their authority, if they want to do it. T 223-2 to 224-5.

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[225] Q. How then, Mr. Thompson, would you follow through on the proposal made in your New York Times letter, without violating the 1962 covenant? T 225-1 to 225-3. A. Well, the 1962 covenant deals with Port Authority revenues and funds. This suggestion, while it might conceivably use the Port Authority as a collection agency on cars going through the tunnels and bridges, still would be something imposed by the states; it might be done simply by a tax levy through the City of New York on all vehicles coming into the city. They might have to buy a sticker to come into the city. There are a variety of ways it could be done, and it would not necessarily flow money through the Port Authority funds that are pledged to the General

Excerpts from Testimony of John F. Thompson

Reserve Fund. In fact, the intent of the proposal was that it would not.

Q. Among the possibilities you contemplate, though, was a tax on automobiles at point of entry. A. That would be one way to handle it, yes.

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[227] Q. Where would a charge imposed on traffic entering into Manhattan be imposed?

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A. I would not consider these tolls. They would be, if you will, taxes on the privilege of coming in.

The Court: Wouldn't you consider that an agreement between New York and New Jersey, Mr. Thompson, or legislation by those states which [228] set up a taxing facility as far as entering into New York from New Jersey would impair the basic covenant—forget about the 1962 covenant—but would impair the basic covenant between the states and the bond holders?

The Witness: No, I would not consider that.

Mr. Sovern: Can I call the witness' attention to the Official Statement at page 28 dealing with rate powers and covenants? • • •

Q. You will find in the first paragraph references to legislation including the covenant, that the two states covenant with each other and with the bond holders that the two states will not diminish or impair the power of the Authority to establish, levy and collect tolls, rents, fares, fees or other charges in connection with any facility owned

or occupied by the Port Authority. Does that affect your— A. I did not consider the idea affected that power. Perhaps legal counsel would dispute this and want to argue it out. But it did not seem to me action by the states on their own behalf and entirely supplementary to the revenue producing ability of the Authority which is here described would impair the authority's power.

[229] Q. Mr. Thompson, if the Port Authority raised the toll on the trans Hudson bridges and tunnels to one dollar and gave the extra fifty cents to mass transit, pursuant to legislation, that would be a plain violation of the covenant, would it not? A. I believe it would, yes.

Q. It would also be a violation of the consolidated bond resolution and each bond resolution. Is that correct? A. Yes.

Q. But you said they can without violating the covenant or any other protection, direct the Port Authority in the exercise of the police and taxing power to collect 50 cents a car for them. Is that correct? T 228-12 to 229-14.

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A. I believe that the states could and that the Port Authority would not be involved in the transaction, except possibly as an agent for the collection of the sums would be separated.

Q. Which do you regard as more inimical to the [230] bondholders' security, your proposal or the repeal of the covenant? A. Obviously the repeal of the covenant.

Q. You testified on direct examination, Mr. Thompson, that the effect of the repeal on other bonds was a serious matter. A. Yes, sir.

Q. And you testified, did you not, that if Governor Byrne had recommended repeal, never mind enacting it, but recommended it before the sale of the Sports Authority bonds,

that the bonds would have been unsaleable. Is that correct? A. I would so testify, yes, sir. T 229-21 to 230-13.

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Q. You also testified New York Power Authority bonds had suffered in their marketability because of the repeal. A. I did, sir, yes.

Q. New York Power Authority bond holders have nothing at risk from mass transit. The repeal of the covenant does not affect the value of their security. [231] Is that correct? A. Well, as far as subjecting them to the hazards of mass transit, it has nothing to do with their security. As far as indicating that the state of origin might revoke and not abide by something that is in their promise to pay, they have a great deal at stake.

[232] Q. So it is a fact that the state has broken its promise that impairs the market ability of power authority bonds? A. Yes, that's correct.

Q. And even though the specific promise broken has nothing to do with the security they have? A. I presume that is correct, yes.

Q. So the same could be true of Port Authority bonds to, could it not? A. I don't follow you, would you rephrase that?

Q. That market is reacting to the fact, if it is reacting at all, to the fact that the state has broken its promise, that it is a matter not of concern about impairment of security. It is concern about the reliability of state promises? A. Well, that certainly is true of the indirect affect on other things. In the case of the Port Authority it has broken its promise to Port Authority bond holders and I don't see how you can separate them.

Q. We don't need to separate them. I take it it is your testimony that the mere fact of breaking of the promise,

irrespective of any security interest would diminish the values of securities issued by New York and New Jersey and its agencies, including the Port Authority? [233] A. Yes, and indeed it has.

Q. I call your attention now to the exhibit marked P-3, a memo by you to Mr. Morton. T 230-19 to 233-3.

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Q. I call your attention to the first sentence, the provisions of section 6 quoted above are part of the contract with holders of bonds issued between March 27th, 1962 and May 10th, 1973.

Were any series of bonds issued after May 10th, 1973, and before the date of your memo? A. Yes, I believe there were two series of bonds issued in that period.

Q. I take it that the implication of your sentence then is the provisions of section 6 were not part of the contract with the holders of those bonds? A. That's correct, yes.

Q. I call your attention to page 4, first paragraph, same exhibit, next to last sentence.

Would it be a fair paraphrase of your view expressed there to say that the investment status of consolidated bonds would be materially impaired unless the Port Authority's incursion in the mass transit field is limited? T 233-5 to 233-23.

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[234] A. Yes, I think so.

Q. [Would] the members of the financial [community] agree?

The Court: If you know.

The Witness: I don't know how to answer that, your Honor. I have not discussed with other members of the financial community your paraphrase of my language so I don't know how to answer it.

Q. You have indicated to my satisfaction that you regard my paraphrase as a fair statement of your view expressed here. I ask you only if your view expressed here was shared by other members of the financial community?

The Court: As you stated it.

The Witness: Yes, I think the financial community realized how little of the net [235] revenues of the Port Authority might conceivably be made available for mass transit if something like that were put through and also therefore extremely concerned about statements of one-hundred-million dollars a year and other things which are entirely out of context of the Port Authority's actual finances.

The Port Authority's net revenues are good for an enterprise the size of the Port Authority, but compared to the mass transit problem, they are peanuts.

Q. There is no legislation pending or gubernatorial proposal to have the Port Authority take over all mass transit, is that, Mr. Thompson? A. Frankly, counsel, nobody in the investment community can tell what the proposals are of those who want repeal. That is one of the unfortunate uncertainties of all of this. It is just destructive and not constructive. T 234-9 to 235-20.

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[239] Q. Tell me now, Mr. Thompson, whether you think a municipal bond could be sold if it was sold with an explicit stipulation in the official statement stating that the State of which the municipal agency is a part reserves the right to modify covenants and provisions affecting the operation of that agency if sufficient public need required? T 239-4 to 239-9.

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Excerpts from Testimony of John F. Thompson

[240] A. Yes, I think it would be difficult to sell such an issue.

Q. You would have to pay a premium for floating such an issue, I suppose. A. If it were saleable it would carry a very high interest cost. Premium is a different word in market parlance. It involves the price factor.

Q. I understand. Thank you. If that is the case why weren't investors paying something more for New York Port Authority bonds when according to your testimony they were under the impression that its covenants could not be modified, whereas an informed investor would have to know that the Massachusetts Port Authority bonds covenants could be modified? T 240-2 to 240-15.

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[241] The Witness: At what point in time?
Mr. Sovern: In April 1974.
The Court: Or prior thereto.
Mr. Sovern: Or prior thereto.

A. I would think that the question never arose in an investor's minds as to the Massachusetts Port Authority. As I said yesterday there was a set of circumstances there which made entirely impractical the sort of drive to get money for mass transit which we have seen here. So the question just does not arise and it is not a real question. T 241-16 to 241-25.

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[244] Q. I'd like to call your attention [245] now, Mr. Thompson, to plaintiff's exhibit 5, your letter. T 244-25 to 245-2.

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Q. That is your letter to Norman Hurd of June 10th, 1974. I call your attention particularly to the final paragraph on page 1. What did you have in mind there when you said that there would be a continued effort in the investment community working with the Port Authority to further [246] its involvement in mass transit within the covenant including the possible request for bondholders consent to a change? A. I think the sentence should be read in connection with the sentence which follows which was if the repeal bill is signed, if the repeal bill is signed. However, all of this potential effort will unfortunately have to be channeled into the mobilization of investors to uphold the covenant in the long constitutional court battle which will ensue. T 245-20 to 246-11.

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[247] A. If you wish me to answer further as to what efforts were going on, I think some efforts were indicated in some of the things we went through yesterday, and some of the memos I wrote, there had been discussion that I knew of with a good many people in the investment community as to how something could be worked out. There has been discussion with Port Authority people. The Port Authority itself presented to the two governors and the governors adopted it, a program involving further involvement in mass transit within the covenant. All of that is now stymied just as I've said it would be.

The Court: What sort of a change in the covenant would you have anticipated the bondholders would consent to?

The Witness: The bondholders [248] might consent to a change which would permit funds that flow to the final reserve fund a consolidated reserve fund to be devoted to this in return for an increase in the interest rate which would be substantial.

Now, I said in one of the memos that quotes were taken from yesterday, that a moderate increase would probably not attract bondholders. And this would not be an easy thing to do, your Honor, but in the long run my opinion was that an attempt in that direction, first an attempt in the direction of doing as much as possible within the covenant. Secondly, if it were then necessary to look for a change agreed to by the bondholders because on that basis, there would be specific proposals. There would be something that would be measurable. There would not be this feeling—just an outright repeal of the covenant—there is an attempt to get money way high on the operating revenues of the Port Authority, which would really impair it. An approach to the bondholders [249] would be in terms of specifics for so much of an application of surplus funds for mass transit might be allowed. But, as I say, that would be the second choice in my mind.

By Mr. Sovern:

Q. It would be fair, would it not, Mr. Thompson, to say that you regard the obtaining of bondholder consent under the conditions set forth in your memorandum as an exceedingly difficult undertaking? A. It would be an exceedingly difficult undertaking and it would have to be, to have any hope of success, it would have to carry substantial benefits to the bondholder in the way of additional interest.

Q. Now, you referred to other plans going forward at the Port Authority to help mass transit within the covenant. A. Yes, sir.

Q. Can you be more particular, more specific? A. The program to extend PATH to the Newark Airport and on

to Plainfield, and the program to—that involves a number of railroad connections, so, I think, in this area, which I can't draw a [250] map of, but there were several of them permitting the flow of mass transit into Penn Station, which is not now possible, and the connection to Kennedy Airport in New York from Penn Station.

[251] Q. Do you have any idea how long those plans have been under consideration by the Port Authority? A. For several years, I don't know exactly.

Q. Do you know whether the Port Authority has certified within the meaning of section 7 that it would not impair the obligations to the bondholders to undertake that enterprise? A. The program calls, as I understand it, for assistance from both state government and from the federal government. These have not all been received. I believe it has been said that there was an expectation of such help from New Jersey which was later denied, so, now, the Commissioners have not yet certified the program.

Q. Do you know what fare levels would have to be set in order to meet the terms of the covenant in order to have those plans go forward? A. No, I don't think any study has ever been presented that brings it down to fares.

Q. Are you familiar with an occasion on which the Port Authority Commissioners refused to go forward with the Plainfield project unless a [PATH] fare increase was approved? A. I don't think I am specifically, no.

[252] Q. It occurred on February 19th in an effort to refresh your recollection, if it is the case, the time involved would have been February 19, 1974? A. I probably was aware of it at the time. It seems a perfectly logical arrangement. I presume the extra fare was needed to obtain the degree of self-support required. T 247-10 to 252-8.

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Excerpts from Testimony of John F. Thompson

[253] Q. I call your particular attention [254] to the paragraph [of Exhibit S-5] beginning with the bottom of column one of the letter in which Mr. Ronan says—he is referring to the time when he approved the—he stated the repeal would be welcome.

"I have also stressed that the lifting of the statutory covenant, per se, does not mean that bondholders' security would be eroded. The two states have not determined and the Commissioners have not acted to impose deficit burdens on the Port Authority in rail or other fields, which could impair revenue coverage or reserve requirements established in our indentures.

"Additionally, the Board of Commissioners is committed to preserve the credit of the Port Authority which is vital to the present and in any future undertakings of the agency.

"Governor Byrne on signing the New Jersey bill expressed his own determination to avoid impairing the Port Authority's credit."

Would you indicate for us which, if any, portions of that paragraph with which you disagree. A. May I request if another letter that was put in evidence yesterday which was my private reply to Commissioner Ronan which incorporates my then [255] views and I am sure will also incorporate my answer to this question.

The Court: Well, I think the question really is do you agree as you are sitting here today with the statements made by Mr. Ronan's letter?

The Witness: Your Honor, the letter I wrote to him was one in which I had given that question a great deal of thought.

The Court: What number was that?

The Witness: P-14. And I think the first paragraph of this letter is appropriate as an answer to your question, leaving out the sentence about the conciliatory tone, "Your personal assurances about the Commissioners' intent to maintain Port Authority credit standing were well-stated. However, the best of intentions are not apt to be persuasive to investors who have just experienced unilateral revocation of an important part of their bond contract.

"Furthermore, if the assurances are to be accepted at face value, it is [256] difficult to understand what is to be gained for mass transit by repeal of this covenant."

That would be my answer to your question.

Excerpts from Testimony of John F. Thompson

Q. You left out the first sentence, "The conciliatory tone of your May 9th response to my letter of May 7th, *New York Times,* is welcome."

Do you recall your testimony yesterday in which you indicated on page 91 of the transcript—the Court had asked you was the investment community equally shocked, the equal being to Governor Byrne's—was the investment community equally shocked [when] the then Governor of New York—this is on page 90, line 24, "advocated repeal and the New York Legislature actually voted the repeal?"

Your answer, "I think to say 'equal shock' would be unfair, your Honor. Let me see if I could explain it. When Rockefeller signed the repeal in 1972, he issued a statement which in its terms was very conciliatory. It had words, 'If it is, like I should be conferring with the Governor of New Jersey to try to work out something here that would not impair the credit of the Port [257] Authority.' It was a less final thing." A. And your question is?

Q. Well, the conciliatory Rockefeller message is regarded as quite important; the conciliatory Ronan message is regarded as worthless. Is that correct? A. The concili-

atory Rockefeller message was issued along the way while the process of repeal was uncompleted. It had to be adopted by New Jersey. It indicated that steps might be taken to do something modifying—more moderate than the repeal.

Conciliatory, there is a word that looks forward to constructive action. Conciliatory here is simply that the tone of his letter which happened after the repeal had been finally concluded or was about to be.

Q. In other words, your answer on page 91 says, "It had words in it like, 'I shall be conferring with the Governor of New Jersey to try to work out something here that will not impair the credit of the Port Authority.'"

When you said that, do you mean that you thought Governor Rockefeller was going to try to induce Governor Cahill not to go along with the repeal? [258] A. No, I thought he was going to talk to Governor Cahill probably sensing that Governor Cahill was opposed to repeal and try to work something out, perhaps along the line of what eventuated, which was the repeal of the covenant applying only to future issues.

Q. And that is why he signed repeal of a wholly different statute in New York? A. Well, he had other reasons. His statement is much longer than that, to be sure.

Q. But he did sign the repeal? A. He did sign the repeal, yes.

Q. You were not troubled after that because he was conciliatory after signing? A. I would never say that. I hoped—I was not troubled by it.

Q. It was less shocking? A. I think I tried to explain the matter as I said yesterday, of shock. I thought I made the point. The shock came from the time that this was an action by a Governor of New Jersey whereas on the

previous occasion, the then Governor of New Jersey had been the bulwark who stopped repeal.

That was the basis of my use of the word "shocked."

[259] Q. Let's see then, you were shocked, tell me if I correctly capture of essence of your testimony: You were less shocked by the Rockefeller signing of the repeal because he wrote a conciliatory statement upon approving repeal and because the process of repeal was not yet concluded, the New Jersey Legislation having not yet been enacted, indeed never been enacted. That is correct.

All right. Now, we are in 1974, Mr. Ronan has written a conciliatory letter and the Governor of New York has not yet approved repeal, but you and your colleagues in the bond market, I think it is fair to say, are behaving in a way that regards him open to persuasion on veto.

Why was not this Ronan conciliatory letter important? A. Because, conciliatory there applied only to tone. It did not apply to anything that suggested Commissioner Ronan would change his position.

Commissioner Ronan had taken a position in favor of repeal.

Q. Governor Rockefeller had not? A. Governor Rockefeller had taken a position favorable to repeal. Governor Wilson had not yet, although it was beginning to be widely believed, [260] would sign the repeal and we were doing everything we could to dissuade him.

Q. I would like to return to that same paragraph, the first sentence says—

The Court: This is S-5?
Mr. Sovern: Yes.
The Court: Do you have S-5?
The Witness: Yes.

Q. This is Mr. Ronan:

"I also stressed the lifting of the statutory covenant, per se, does not mean that bondholders' security would be eroded."

Do you agree with that statement? A. No, sir.

Q. The next sentence says, "The two states have not yet determined and the Commissioners have not acted to impose deficit burdens on the Port in the rail or other fields which could impair revenue coverage or the reserve requirements established in our indentures." A. They have not acted because they could not under the covenant. The covenant was then still in force.

Q. Could they act now? A. Your Honor, that calls for a legal opinion, [261] I am afraid.

The Court: No, it is based upon your understanding of the consolidated bond resolution reserve requirements, the statutory reserve requirements, all of which I assume were matters of your personal knowledge prior to the enactment of the covenant because you were dealing with these bonds before the covenant was ever enacted.

The Witness: I think if they acted now to impose deficit funds on the Port Authority in the rail or other fields which could impair revenue coverage—

The Court: Or reserve requirements?

The Witness: —or reserve requirements, there would be an additional lawsuit filed on the same ground that are present in this suit. This would be my understanding.

The Court: But there were still protections which the bondholders had without the covenant if the Commissioners of the Port Authority acted in such a manner [262] as to impair the revenue coverage or

the reserve requirements pursuant to which the bonds had been issued?

Mr. Landis. I do not think that was the context of the question. My recollection was the question was asked in the context of repeal and this covenant.

The Court: I am saying—

Mr. Landis: After it had been repealed, whether now they could do it? The witness answered he does not know what the legal situation is.

The Court: Mr. Landis, please, if that is an objection, it is overruled.

Now, the covenant has been repealed, presumably the bondholders are back to where they were prior to the enactment of the covenant in 1962.

You are dealing with those bonds in the period prior to the enactment of the covenant and I assume you were familiar with what the protections were that the bondholders had before the enactment of the covenant and I think the question was could the Commissioners have, or do you [263] agree with the statement of Mr. Ronan that, in effect, the Commissioners could not impair the reserve requirements or the revenue coverage under the statutes and resolutions in effect without the covenant if they would do so today or attempted to do so?

The Witness: As I read Mr. Ronan's statement, your Honor, it is to the effect that the Commissioners had not acted and I think the question directed to me was whether I agreed with Mr. Ronan's statement.

[264] Mr. Sovern: There was another question following it.

The Court: There was another question which followed it. Could they?

Excerpts from Testimony of John F. Thompson

Q. You said they could not because of the covenant, and I asked you whether they could today? A. My answer was that they could try, but I think that they would be brought into Court under the covenant.

The Court: Under the covenant?

The Witness: Yes.

The Court: Which covenant are you referring to?

The Witness: The 1962 covenant forbidding taking on a deficit rail mass transit on the grounds that repeal would impair the constitutional rights of the bondholders.

The Court: Let's forget about mass transit for the moment. Let's say the Port Authority decided it was going to build another World Trade Center, maybe the Moon Center, and they projected a cost of one billion dollars and knowing what the market conditions are today, and certainly there is nothing in the covenant which precluded them from undertaking such a venture, is that correct?

[265] The Witness: Nothing in the Section 7.

The Court: So all the bondholders would have as protection would be the Consolidated Bond Resolution requirements, the Certification, the 1.3 test and the general refunding bond statutory reserve requirements.

Mr. Meyner: I think you omitted something your Honor, must have State legislation of both States.

The Court: Yes, we are assuming the States have concurred in permitting them to go ahead with the venture; and let's assume that the bondholders decided that it would impair the credit of the Port Authority and impair the reserve requirements and the revenue coverage requirements; wouldn't the

Excerpts from Testimony of John F. Thompson

bondholders be able to go into Court to enjoin such action by the Commissioners and the State?

The Witness: I am not sure whether the hypothesis includes the Commissioners having adopted this.

The Court: Yes, that the Commissioners have adopted this.

The Witness: And they have certified it?

The Court: They made the certification.

[266] The Witness: Under Section 7 and whatever certification they need to do on the 1.3 test.

The Court: Yes.

The Witness: Well, the question that would arise I believe under the 1.3 test, and it might arise under the very extreme example which you have given—that is a lot of money.

The Court: If they built one, they can build another one.

The Witness: Under the very extreme example you have given the 1.3 question might arise, and it might be that the Port Authority would be unable to get bond Counsel to give an opinion that bonds could be legally issued at that time.

The Court: Well, that was not the question. Wouldn't the bondholders be able to go into court to challenge the certifications made by the Commissioners as to the various requirements that must be met before they could proceed with such a project?

Mr. Landis: With all due respect, your Honor, I object to the form of the question. I think it asks the witness whether some people can bring a suit. We all know that anybody can bring a suit at any time. If it asks him whether [267] the suit will be successful or not, I think it clearly asks for a legal opinion.

The Court: I want to try to find out what his understanding is of the protections which the bondholders had under the terms of the covenant and the prior statutes.

The Witness: Under the—

The Court: Under the Consolidated Bond resolution—

The Witness: Section 7.

The Court: That is right, and the prior statutes.

The Witness: Your Honor, I don't believe a legal question could be raised under Section 7. If the Commissioners certify that the project will not substantially or whatever—

The Court: Impair the credit.

The Witness: —impair the credit of the Authority, I doubt—here again, I am afraid I am expressing a legal opinion—I doubt that that could be contested. I would presume that their finding would be final in that respect.

As far as the 1.3 is concerned, the answer I gave you is the way I think a legal problem would arise. And I am very serious about that [268] because one of the most important facts at issue regarding the issuance of municipal bonds of any kind is getting a proper legal opinion from a recognized firm that these bonds can be legally issued. And if they could not indeed comply with the 1.3 coverage test, then as I understand the consolidated bond resolution the new bonds would not be legally issued. And I don't believe—if I may go further, I don't believe that existing bondholders would have any other way to get at it that I know of.

The Court: Is it your understanding that bondholders could never go into Court with respect to

any undertaking of the Port Authority, to challenge the validity of the statistics or figures relied upon by the Commissioners as the basis for the issuance of bonds for new facilities?

The Witness: It seems to me sir that the Section 7 findings by the Commissioners would be final. Again I am not a lawyer.

The Court: No.

The Witness: I am not sure of my answers here. And I think the legal problem on the other arises in a different manner. It might be then that—

[269] The Court: Let's say the Commissioners got a set of figures from a consultant. All right?

The Witness: That's right.

The Court: And that is before them when they act to approve the project and the issuance of the bonds; and the Bond Counsel then issues his opinion that the bonds are legal issues. All I am asking you is what your understanding is of the 1.3 test. Let's bring it down to that.

The Witness: The legal opinion has been issued?

The Court: Yes, the legal opinion has been issued based upon the statistics and the projections which the Commissioners have in front of them when they approve the issue; is it your understanding that the bondholders could never in any forum challenge the validity of the projections which were made.

The Witness: Yes sir, that is my understanding.

The Court: Then let me go to the next step. If that is the case, now supposing the Commissioners have before them a mass transit project with a set of figures prepared by Joe Doaks, whom they recognize that the investment [270] community would never

accept as a qualified statistician, and they approve a mass transit facility and they certify that it is self-sustaining—all right?

The Witness: Yes.

The Court: —and again they made the certification; are you saying that the bondholders—now we are operating within the covenant—are precluded from coming into Court and challenging the validity of the statistics which formed the basis for the Port Authority's actions?

Mr. Landis: For the record, your Honor, I know what your feeling is, but I wanted to note that I would object to this line of questioning. This clearly is asking the witness for a legal opinion.

The Court: No. I want to know what his understanding of the covenant is now.

Mr. Landis: I think in the context of the way the question is asked, it clearly asks for a legal opinion. I do not press the point because I know what your position is.

[271] The Witness: Your Honor, on that point I'm not sure at this point. I would think there would be more chance of a contest there, bringing a suit there than there would be on any of the others.

The Court: Well, we are dealing with objective facts now.

The Witness: Yes, yes, that's true.

The Court: There is the 1.3 test, the mathematical test that must be applied based upon the criteria which are set forth in the resolution, and in the covenant you are dealing with a certification that the project is going to be self-supporting. Well, again, we are dealing with a mathematical test, the projections which are made, do they show that the project will be self-supporting.

Mr. Landis: Your Honor, do I understand that you are saying that the tests are the same, the 1.3—

The Court: No, I'm saying they are both objective tests.

Mr. Landis: But they are entirely [272] different tests. I think the record indicates that already.

The Court: They are different tests, I understand, but both are based upon projections of revenues.

Mr. Landis: Now, the 1.3—

The Court: And costs.

Mr. Landis: Now, the 1.3 test is historical revenues, in the first instance is historical revenues.

The Witness: Your Honor, I feel that this is a legal problem, and I certainly don't have a conclusive opinion on it.

The Court: Okay. What I am leading up to is this: Doesn't the investment community with respect to the acceptance of an Authority's bonds as proper investments really look to the integrity of the management of the particular Authority? And to the past performance record of the issuing Authority, the expertise of its staff, and so forth, as much as they do to a specific covenant or undertaking? Isn't that just as equally as important, if not [273] even more important?

The Witness: It certainly is very important and an exact equation, I would—

The Court: You may not be able to weigh them one against the other.

The Witness: But both are very important, and certainly the record of management, and I might say

that the record of management can become a very broad thing in a bi-state agency of this sort, including the appointive powers of the Commissioners, the influence of the governors and the Legislatures of the two states, all these things become part of the way of the record of management.

The Court: Yes, without any question.
All right, I'm sorry.

By Mr. Sovern:

Q. To be sure I caught the full import of your response to the series of the Judge's questions, is it accurate to say that of the protective covenants we have been talking about, to wit, Section 7 certification and the 1.3 tests and the mass transit covenant, of those three, the [274] mass transit covenant is the only one you feel confident entitles the bondholders to suit?

Mr. Landis: Your Honor, I have an objection. I don't think that was his testimony at all.

Mr. Sovern: If it isn't he can say so.
Excuse me, your Honor.

A. Feel confident is too strong.

The Court: Yes.

A. (Continuing) It is the only one where I think there is some possibility. Not being a lawyer and not being sure there is, I think, some possibility of bondholder action.

The Court: A better possibility than with respect to the others?

The Witness: A better possibility than with respect to the others.

By Mr. Sovern:

Q. And that would be a major reason for attaching importance to it, is that correct? A. A major reason?

Q. For attaching high importance to it. A. Yes, that would be an important reason.

[275] Q. Now, I'd like to come back—

The Court: Well, I take it that the reason for that is that if the covenant as such is not enforceable in a court, aside from the action of the marketplace, then it is really meaningless, it is worthless?

The Witness: Yes, it was certainly sold to investors as a legally enforceable contract.

Q. Now, I come back to my question with respect to S-5, the paragraph under discussion, the second sentence: The two states have not determined, and the two Commissioners have not acted, et cetera, and I asked you whether they could, and you said they could not so act because of the covenant. The covenant has now been repealed. And I ask you whether they could so act today? A. I think that gets into this question of—I think they could not—if the covenant is a legally enforceable matter—•••

Q. I take it you are assuming that if such actions were attempted, the plaintiffs here would ask [Judge] Gelman to enjoin the Port Authority from doing that under the covenant? [276] A. Yes, I'm fully familiar with all the legal—
T 253-25 to 276-2.

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Q. You will see that Mr. Landis asked, "Now, let us assume at this point in time, a 100 million dollar bond issue, the purposing being to finance an investment of the Port Authority in mass transit that would not be self-supporting and a sale of a competitive bidding, what is your opinion as to what those bids would be," and that you thought that the issue would be more costly. T 276-10 to 276-17.

Excerpts from Testimony of John F. Thompson

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[277] The Witness: Yes, yes. I think the situation you hypotheticate there would be in the market the equivalent of the situation in which the Port Authority announced today on a 100 million dollar issue two weeks from now for whatever purpose, and this is a question that I have reviewed with our market people to considerable effect, and the general opinion that I get is that in this market it would cost the [278] Port Authority an interest cost of some 8½ percent. The quotations currently on outstanding Port Authority bonds indicate yields, interest rates to the investor of something like 6.50, 6.80. This indicates to me that such an issue coming to market would immediately drop the secondary market for all other Port issues. And we calculated it by some 6 to 10 points. T 277-17 to 278-11.

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[279] The Court: And Mr. Sovern has said, as I understand in giving the answer which you ultimately did, did you assume that the bondholders were in court challenging the validity of the repeal of the covenant?

Mr. Landis: I don't see any point in asking him if he assumed something that we all know is true.

The Court: Well, let him answer.

The Witness: I understood the question states what is your opinion as to what those bids would be. That assumes that the sale of the issue would go forward to the date of receiving bids without [280] court action. The question of court action did not enter my mind in answering that question.

Mr. Sovern: Now, your Honor, Mr. Landis has just said we are all assuming the court action.

Excerpts from Testimony of John F. Thompson

The Court: No, no, no, the witness has said—you asked him—

Mr. Sovern: Yes.

The Court: You asked him specifically whether he assumed when he gave his answer that there was a bondholder action challenging the validity of repeal.

And he said he did not.

Mr. Sovern: He did not assume that.

The Witness: No.

Mr. Landis: So your Honor, that is not my understanding of his question. What he said is he did not assume a decision.

The Witness: I did not —

The Court: All right. He did not assume a decision.

The Witness: I did not assume [281] either way. I assumed that I was asked where such an issue would sell, what bids it would receive, and I tried to simply answer that question without that—at that time, we were talking markets and not covenant. T 279-12 to 281-6.

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[284] Q. The next sentence of that paragraph under consideration is, "The Board of Commissioners is committed to preserve the credit of the Port Authority which is vital to the present and any future undertaking of the agency." Do you agree with that statement? A. I certainly agree with it as what would be their statement of preference. That obviously is what they would say, and this was one of the things I was responding to in my reply to Commissioner Ronan.

Q. Do you agree with the final sentence of the paragraph?

Excerpts from Testimony of John F. Thompson

The Court: I thought that was the final sentence.

Mr. Landis: It is.

Mr. Sovern: No, the final sentence is, "Governor Byrne—"

The Witness: Governor Byrne—I wasn't there. I don't recall seeing his statement. I presume he said that. This is what I would say if I were in his place doing what he did.

Q. Would you regard it as conciliatory? [285] A. Oh, it's in a sense, yes, but I would also regard it as saying, "We're taking a drastic action here, but hold still, it won't really hurt."

Q. How does that differ from what Governor Rockefeller did? A. I think Governor Rockefeller spelled out the possibility of compromise on the issue much more fully. T 284-1 to 285-9.

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[287] Q. Now, it is suggested in the brief of Counsel for the Plaintiff that one of the virtues of the covenant is that it would prevent the States from foisting a white elephant upon the Port Authority—that is to say, that if no bonds were issued, the Section 7 and 1.3 tests would not come into play and that therefore there is a risk that they just might make a gift here, and I don't attribute all the details of it, but in your opinion, if the covenant's repeal is upheld, do you understand that the States would then be free to avoid the protections of the 1.3 tests and the Section 7 certification by simply giving the Port Authority some deficit generating facility? T 287-5 to 287-16.

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[288] The Witness: I think there is a very real possibility of this. It is again, a legal question in considerable part.

Excerpts from Testimony of John F. Thompson

Q. And so that is one of the safeguards afforded in your opinion by the covenant that is not otherwise vouchsafed to the bondholders? A. I would think those circumstances would—

Q. Are you familiar with Section 7 of the Resolution establishing each of the series of bonds? A. Yes, I think we went over that yesterday. T 288-15 to 288-24.

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[293] Q. May the General Reserve Fund be used to pay the operating expenses for a facility for which bonds have not been issued? A. No, the General Reserve Fund may be used to pay for all operating expenses for a facility on which bonds—

Q. May the Consolidated Bond Reserve Fund be used to pay the operating expenses of a facility for which bonds have not been issued? A. I would think not, no.

The Court: You have answered the question.

Q. Now, you also testified yesterday that you regard the Section 6 covenant, the mass transit covenant as more exact, I believe, that was your phrase, but if it was [294] not, please correct me, than the 1.3 [and] Section 7 reassurances.

Is that your testimony? A. Yes, I used the word "precise" rather than exact, I think. I guess they are synonyms.

Q. At that time, the Court asked you about the definition of self-supporting. Do you recall that? A. Yes, you are now referring to the Section 6 covenant.

[295] Q. And you regard that as a precise definition? A. Precise in the sense that it must be referring solely to the expectations of this one facility.

Q. As you read that, could the states of New York and New Jersey agree that they would give all of their mass

transit enterprises to the Port Authority with a pledge of tax support for those facilities for the ensuing ten years and then get the necessary certification that the facility was self-supporting? A. There is other language in here that deals, I believe, with recurring debt from some other sources. T 293-12 to 295-14.

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[296] Q. You do not see anything in this covenant that would prevent the kind of public action [297] that I have indicated in my question earlier? A. Which the states would pick up for ten years and then run?

Q. And then Whammo. That's right. They don't say what they will do.

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The Court: They don't say.

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Q. They simply make a ten-year commitment. A. It looks as though it might technically comply.

Q. Why do you say technically comply? It would be possible, would it not, as far as you can tell? A. As far as I can tell at the moment. I would want to study the matter a good deal further before giving an informed opinion on it.

Q. If that is a permissible reading of the covenant, is that a subject for bondholder concern? A. The situation is very hypothetical. It would require all the bodies to be in on the deal, as it were. I think it is too hypothetical for me to pass judgment on it at this point.

The Court: Have you ever given any consideration to that possibility?

[298] The Witness: No. I think that whatever consideration has been given to that possibility has been on the basis of the states would act in a matter like that in good faith; having started it, it is very hard to stop a subsidy once you have started it.

Q. The basic assurance here is that the states and the Authority would behave in a responsible way. A. No, the basic assurance is that it would be for ten years self-supporting.

Q. And the bondholders are not concerned with the eleventh year? A. I think that gets into a sort of never-never land. It is pretty theoretical. I would not want to answer that, yes or no.

Q. I think I must press you, Mr. Thompson. As I read the covenant, it seems to me to permit exactly what I have suggested to you. You do not read it contrary. You have testified that you give a great deal of advice based on the covenant, and I ask you whether that advice is based on the assumption that this is not going to happen and that it is not going to happen because the basic [299] premise of bondholder reliance is that neither the states nor the Port Authority are going to engage in suicidal pacts and are going to conduct their affairs in a way that will enable them to continue as a viable entity. A. Which means in this case that they would have put their name on the line for a pledge of revenues, the estimates of revenues and debt service to satisfy the self-supporting requirements.

Q. I am assuming that those estimates are impeccable, not only in the sense that everybody behaved with honor at the point at which he made them out, but that unlike all other estimates they prove to be accurate and that the states did indeed keep that as a self-supporting facility for the entire decade. No one has made any promises for the eleventh year. It would not be dishonorable by any measure of good faith, would it, to refuse to renew a commit-

Excerpts from Testimony of John F. Thompson

ment when you made no commitment that you would renew the commitment? A. I did not understand you to say that the states made a commitment limited to ten years.

The Court: That was the assumption.

The Witness: They made a commitment to do it is what I understood you to [300] say.

Q. For ten years and no longer. A. Then I think you would have some trouble in the market.

Q. You think that would cause the Port Authority to have difficulty marketing its bonds now or in the eleventh year? T 296-24 to 300-8.

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[304] The Court: Make that assumption, that both states [305] have adopted a referendum which enables the Legislature to pledge for a ten-year period their revenues to pay the deficits. All right?

The Witness: Yes.

The Court: Now go on with your question.

Q. Would anyone who bought bonds with such a covenant in them—and by such a covenant, I mean the 1962 covenant—be relying on the covenant or on other protections for his security? A. The question assumes that someone would buy bonds. And if they were ten-year bonds, somebody would.

Q. I ask you to assume that they are Port Authority bonds marketed in the period between 1962 and 1973 is the last—1973. The 1962 covenant was in the 20th and to the 39th series. You have testified at great length and in great detail about relying on that covenant. You may have observed that we think that perhaps people relied on something else.

Excerpts from Testimony of John F. Thompson

And I am asking you now whether if that covenant permits that kind of behavior people were relying on that covenant or the other protections [306] which include the integrity of the operation both of the Port Authority itself and of the governments of the two states. A. I simply do not think that the Port Authority would go along with the projection of such a situation or that the states would do such a foolish thing as to vote a commitment for a half or a third of the life of a bond if they were doing something. You know, covenants and laws operate in a real world and deal with real situations; and this is not one.

Q. You are not concerned about the states of New York and New Jersey dumping their mass transit on the Port Authority? A. Now you are asking me a different question. I am not concerned about the hypothetical situation that you raised.

Q. What aspect of my hypothetical situation do you regard as unreal—academic, as you prefer to call them? A. I regard the notion that any responsible person in the Governor's offices or the Legislatures or the Port Authority staff or Commissioners would put together a device involving a ten-year covenant of support or something in order to sell 30-year bonds.

[307] Q. If that were the only way that you could both finance mass transit, as you put it, to meet the problems of energy and urban matters, if that were the only way or adjudged to be the best way to meet the problems with mass transit, why wouldn't they do it? What is there magical about a ten-year commitment or a thirty-year commitment if there is nothing wrong with it? A. I would like you to go sometime through the procedure of assessing a bond issue and looking down the road where the revenue comes from. Your Honor, this is just so unreal that it is silly. T 304-25 to 307-13.

Excerpts from Testimony of John F. Thompson

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Q. Isn't the reason that you are not concerned about this possibility that you have confidence [that] the states and the Port Authority, all 3 [308] as you noted, will not get together to adopt a plan that would obviously destroy the fiscal integrity of the Port Authority? A. I certainly think they won't get together to do anything as foolish as you have suggested, if that answers your question. T 307-23 to 308-6.

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[309] Q. I'd like to come back to the covenant for just a brief while longer.

Mr. Thompson, in stating that you relied on the protections afforded by the 1962 covenant did you rely on the pledge that neither the States nor the Port Authority will use any of the Port Authority's revenues for mass transit except insofar as the facility is self-supporting or its deficits fall in conjunction with those of the Hudson and Manhattan within the 1/10th of the General Reserve Fund limitation? Did you rely on that? A. Yes, certainly.

Q. Did you rely on anything else in the covenant? A. In the covenant?

The Court: Within the covenant?

Mr. Sovern: Yes.

Q. Was there anything else of importance in the covenant to you?

The Court: I assume when you say "covenant" you mean the legislation in 1962.

Mr. Sovern: To be precise Subsection B. As I say I'm excluding now for purposes of [310] simplification the first part which is not [in] issue. A. Subsection A has not been repealed.

Excerpts from Testimony of John F. Thompson

Q. Exactly. A. I think that summarizes the covenant, what we relied on.

Q. Yes. I'd like to come back to something else we talked about a while ago. Did I understand you to testify earlier this morning that if the Port Authority were given a white elephant that all of the revenues of the Port Authority operation, operating revenue would be pooled in order to support that before debt service would be paid? A. That's the way I understand it. It's under the net revenues that are placed the debt. T 309-4 to 310-13.

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[312] The Court: If no Consolidated Bond has ever been issued for the establishment, acquisition, effectuation, construction, rehabilitation or improvement of a white elephant, can the deficits of the white elephant be a charge upon the net revenue of these facilities that are enumerated in the preceding paragraph prior to the payment of the debt service rquirement and all the rest?

Mr. Sovern: Thank you, yuor Honor.

The Witness: I don't see anything here which prevents it. This is a pledge of revenues to Consolidated Bonds. It tells where Consolidated Bonds get their revenues. It doesn't say how the Port Authority shall operate its projects or keep its accounts otherwise.

Now, I think you said yesterday that [313] Newark Airport is operating at a deficit. Its about the only operating expenses there come from the other airports.

Q. So one of the reasons for your believing that the Section 6 covenant is important is that you believe that the

pledged revenues of all of the other Port facilities may be diverted to carry their losses even before that debt service requirements are met? A. No, sir, I do not believe that the pledged revenues may be diverted because the pledged revenues are net revenues.

[314] Q. All right. Thank you.

You believe then that in determining the net revenues of the Port Authority for the purposes of the Consolidated Bond resolution, that the Port Authority is entitled to pool both facilities for which Consolidated Bonds had been issued and other facilities for which no bonds had been issued? A. So far as I know, their accounting and their method of operating pools their revenues from all their facilities and there must be some for which Consolidated Bonds were not issued.

Q. I gather that it is because you believe that such pooling is possible that you regard the covenant as an especially important protection? T 312-10 to 314-13.

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[315] A. No, I won't have those words put in my mouth. I believe that this is one situation that might arise that makes the covenant important.

Q. Thank you.

At page 14 of Plaintiff's trial brief, it is said and I quote, "While Plaintiff concedes that in rare instances a State's contract can be constitutionally abrogated by a proper exercise of the State's never abdicated police powers," and it goes on, what I want to ask you is whether you are aware of the proposition contained in the language which I just read to you? T 315-2 to 315-12.

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The Witness: Your Honor, a day or two ago, I read a brief prepared by someone on this subject

which cited some cases pro and con and came to the conclusion that this case was in the class of those where the police power would not [316] prevail.

The Court: That is not the question which he asked you.

The Witness: I am aware.

The Court: You are aware?

The Witness: I am aware that there have been these cases and a number have been adjudicated.

Q. When did you first become aware of them? A. I think in a general way I have been aware of that sort of thing since graduate school days, probably. T 315-21 to 316-10.

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[317] Q. Did you know anything about inter-State compacts, the need for Congressional consent thereto? A. Since a suit was raised in this regard, I have become aware of this contention. I think I testified yesterday that it was not a contention which I took seriously, namely that any covenant must be approved by Congress because [318] there have been a number of past covenants, and I cited one yesterday, regarding the distance within which the States would not build any competing bridge and to my knowledge, that was not approved by Congress, nor was it considered necessary, and looking at it in the practical way, that, your Honor has suggested I do, this seemed to support the validity and the enforceability of the covenant that we are here concerned with.

Q. So your testimony is that you first learned that there might even be an issue as to the need for Congressional consent for the '62 covenant sometime after the Plaintiff instituted this action against the State of New Jersey? A. No, this other suit that the young man was here on.

Excerpts from Testimony of John F. Thompson

The Court: He means the *Gaby* case.

Q. The *Gaby* case? A. And its predecessor in New York State.

The Court: There was a prior New York litigation.

Mr. Sovern: The State will now mark for identification a story from the Daily Bond Buyer, Monday, June 24, 1974. It will be S-7. It came from the files, here is a copy for the witness.

I call your attention to column two. The second full paragraph.

[319] Did you see this story at the time it was published?

A. Yes.

Q. And you noticed that the Daily Bond Buyer says, "Repudiations of Solemn Pledges are Not Unique."

Do you agree with that? A. Well, I think it is in relation to what follows.

The Court: No, he is asking you whether you agree with that statement, not what the writer intended.

The Witness: Well, there have been other repudiations of solemn pledges granted. Some of them have been taken to Court and beaten down too.

Q. All right. A. This article, by the way, is a sort of editorial that John Winders does every week. To say that this is what the Bond Buyer says is not quite descriptive of the type of thing it is.

Q. Would you give the witness P-11, please?

P-11 is Moody Bond Survey, June 11, 1974.

Excerpts from Testimony of John F. Thompson

I call your attention to the final paragraph in column one.

In particular, the second sentence, "Both States have the right to alter corporate charter rights under constitutional provisions enacted following the famous case [320] of the *Trustees of Dartmouth College against Woodward.*"

Did you see that assertation when it was published? A. Yes, and I did not fully-understand it.

The Court: I concur. T 317-20 to 320-4.

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[322] Q. Mr. Thompson, does the institution of a lawsuit affect the value of a bond? A. Under what circumstances?

Q. Have you ever bought any bonds that were involved in a law suit? A. Where the validity of the bonds was involved in a lawsuit.

Q. I will start with that. A. If it was a new issue, my good friends in the bond legal firms would give an opinion on it, so I would not [323] be confronted with the question.

Q. And I am not referring to this case now. Have you ever been in a situation where you had to make a decision as to whether to participate in an offering or advise a client to purchase bonds that were involved in litigation in any way? A. This is a matter of such varied degree—

The Court: He is saying any form of litigation, for openers.

The Witness: We were involved not too long ago in an attempt to revive part of an issue down in Texas where there was some litigation started about the ownership of the property to be taken over for a generating plant.

Relying on the attorneys in Texas, we felt that the litigation was really part of the bargaining process over the price of the land, did not involve the

validity of the bonds and we were willing to try to proceed. We were unsuccessful because our partners did not go along.

I know that is not a whole answer to your question, but your question covers so many different possible situations. T 322-16 to 323-23.

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[325] Mr. Sovern: I'd like to ask the witness next about P-11. Will you give him a copy, please?

The Court: Yes. P-11. You already referred to that.

Mr. Sovern: I am referring to a different entry now, your Honor, the same paragraph, however.

By Mr. Sovern:

Q. At this time the final sentence at the end of column one, what is suggested is a considerable period of uncertainty and, perhaps, time lies ahead of these matters are litigated.

Uncertainty is not the bondholder's friend. Do you agree with that? A. Yes, certainly.

Q. And would that apply to this case? A. I think that's what he's talking about, isn't it?

Q. And you agree with the assertion with respect to this case? A. That a long period of uncertainty lies ahead, yes.

Q. And that it is not a bondholder's friend? [326] A. Uncertainty is not a bondholder's friend.

Q. And would presumably affect—strike presumably. And would affect the price of the bonds in the secondary market? A. Yes, it would affect them somewhat. T 325-1 to 326-5.

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By Mr. Sovern:

Q. I would like next to call the witness's attention to P-10, news release, Securities Industry Association, dated 5/15/74? A. Yes.

Q. I call your attention to the final sentence of the release. You think bond prices are affected by assertions that say "measures such as the proposed repeal are destructive of investor confidence and thus of public credit; the most certain [327] effect is to impair the ability to finance future public projects"? A. What is your question about it?

The Court: Do you agree with that statement? It is the last—

Mr. Sovern: Well, I am sorry.

Q. It is, do you think that statement would affect the price of Port bonds?

The Court: Oh.

A. Well, this statement was, I believe, one of several dealing with the Governor of New York when some of us were attempting to affect his decision.

The Court: That doesn't answer his question.

The Witness: I don't think it had any market impact, your Honor.

Q. Because it was a private document given only to the Governor? A. It may well have been published somewhere.

Q. Look at the top of the page on the left-hand side, it says "news release" on one-half of the page and on the other side its says, "for immediate release." It was a press

release, wasn't it? A. I don't remember that it was very widely [328] published, but it was a press release. You are quite right.

Q. Very good. Now that you know it was a press release, do you think it affected the price of the bonds? A. No, no, because what it says in that last sentence was the obvious to any investor.

Q. I'd like the witness to look next at P-12, that is, an article from Barron's dated 6/3/74. Do you have that article before you, Mr. Thompson? A. May I speak off the record.

(Discussion off the record.)

Q. Do you recognize that article? A. Yes, I think so.

Q. Did you have anything to do with its preparation? A. I think Miss or Mrs. Pacey came in for an interview about it at one time. I've forgotten whether she agreed not to quote me directly, or, perhaps you know. You read it more recently.

Q. I have a very bad copy. As nearly as I can tell she did not quote you. But how would you describe the circumstances of her interviewing you? [329] A. Well, she called up and said she wanted to do an article on this subject and someone had given her my name as somebody who might inform her on some of the considerations involved. At that time I was able to grant her an interview.

Q. Do you think this article had any effect on the price of Port bonds? A. The date isn't indicated and I have forgotten.

Q. This is the way it was produced for us. Oh, it's June 3, 1974? A. I wouldn't have thought of it as something having any effect on the market, no.

Q. Nothing in it would give bondholders concern? A. Well, it mentions the repeal of the covenant, but that was

covered in other news items that people already knew. I don't think this was the first information they had about repeal of the covenant. T 326-17 to 329-20.

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[330] Q. There is nothing else in that article that would be troublesome to bondholders? A. Well, the overall question it raises is about moral obligations certainly would confirm something that's troublesome to bondholders, yes. T 330-3 to 330-7.

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[331] Mr. Sovern: S-9 is a *New York Times* story headed, "Port Authority Abandons Mass Transit Opposition." T 331-2 to 331-4.

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Mr. Sovern: There is no dateline on that story, your Honor, but from its content it plainly was on May 1, the day following repeal in New Jersey and the holding of a press conference. T 331-11 to 331-15.

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[332] Q. I call your attention to the bottom of the column where it is said that the: United States Trust Company contended that repealing the covenant would jeopardize the agency's—meaning the Port Authority—the agency's financial capacity to back its bonds and impair its credit rating for future issues.

Do you think that would affect the price of bonds? A. That the United States Trust Company suit said that, no.

Q. I did not ask you that the United States Trust Company suit said that. I asked if the fact that they said this would affect the price of the bonds. A. No. I think they were just stating a truism in the investment world.

Excerpts from Testimony of John F. Thompson

Q. You think a public announcement by the largest holder of Port Authority bonds whose decision to dump on the market, you said, to dump any large number of bonds, you said would drive prices way down—the announcement by that largest holder and the trustee both, that the agency's financial capacity was being jeopardized and its credit was being impaired would affect the price of the bonds? T 332-4 to 332-24.

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[333] The Court: Would the making of the statement itself and its being reported in the press as reflected in S-9 affect the price of the bonds in your judgment?

A. Not considering the fact that the event had already been fully reported, the event of repeal.

Q. So that the price was as low as it was going to go? A. I am not going to try to predict what the price would be that day or that week. T 333-7 to 333-15.

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Q. You say that the Trust Company's assertions about the impaired capacity of the Port Authority had no effect on the price of Port bonds in the secondary market, because people already knew about the repeal of the covenant? A. Yes.

Q. Is that your testimony? A. Yes, I will go with that.

Q. And so the assertions of assessments [334] of a security by its largest holder do not affect the secondary marketprice of that security? A. Not when they are statements of things that are generally and fully recognized in the investment community.

Q. Have you ever bought a bond about which it was said—a bond or any other security about which it was said

Excerpts from Testimony of John F. Thompson

that its financial capacity was jeopardized and its credit rating impaired?

The court: By whom?

Mr. Sovern: By the largest holder of that security.

The Court: If it was, you know—

Q. If the largest holder of the security made those assertions would you go out and buy the bond? A. It would depend entirely on my own independent judgment of the situation.

Q. Have you ever used your independent judgment to buy such a bond? A. I have used my independent judgment to buy bonds when others thought that there were difficulties and would not do so, yes. T 333-18 to 334-21.

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[335] Q. Yesterday you testified about the Port Authority's facilities and the breaking of a common thread with the acquisition of the H & M. How was that common thread broken? A. The facilities acquired or constructed up to then had all been expected eventually to become self-supporting. H & M was not.

Q. Self-supporting at what point in the future? [336] A. Within a reasonable time, within three, four, or five years.

Q. Were those expectations fulfilled, to your knowledge? A. In what cases?

Q. I am asking you about your understanding about the Port Authority's experience with deficit facilities. Do you know of any cases in which their expectations were not fulfilled that the enterprise would become profitable within a reasonable period of time. I think you said three or four years. T 335-17 to 336-11.

Excerpts from Testimony of John F. Thompson

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A. I am not sure that my facility knowledge of the Port operation is sufficient to give you a full and accurate answer. I have understood that one or two facilities from [337] time to time have not done as well as hoped, but on the whole the reverse is true. T 336-23 to 337-2.

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Q. So your assumption that the Port Authority's moving from what had been almost entirely, with one or two exceptions, profitable enterprises to mass transit was a major factor in your concern about the acquisition of the Hudson and Manhattan? A. Yes, it was a factor of concern.

Q. And it continues to be a major concern down to today. That is to say, if the repeal of the covenant is upheld you are concerned that that pattern of profit making activity will be broken with the introduction of this deficit generating facility. A. I understand that is the purpose of the repeal.

Q. So the answer to my question is yes. A. That is a concern, yes.

Q. Now yesterday you gave as an example of the political pressures that are brought to bear on governors and the reason for bond holder fear, the fact that the governors vetoed the PATH fare increase. Is that correct? A. Yes. I understand that I mis-stated the exact procedure that took effect from lack of knowledge, that [338] actually the governors had already signed the minutes of the appropriate meeting when the fare request was approved, but that later on they persuaded the Commissioners to withdraw the application to the Interstate Commerce Commission for permission to raise the fare.

Q. Now, I believe it is accurate to say that you have throughout your time on the witness stand referred to the

Excerpts from Testimony of John F. Thompson

covenant as a bar to engagement of the Port Authority in mass transit. Is that correct? A. In deficit producing mass transit.

Q. Does it permit the Port Authority to operate bus lines that run at a deficit? A. The covenant, I believe, has the word rail in it. So bus lines are not included.

Q. Did most investors know that? A. I have not taken a poll. I don't believe I know the answer to that. T 337-6 to 338-17.

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[339] Q. Are you familiar with the economics of the operations of the airport part of the Port Authority's business? T 339-6 to 339-8.

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[340] Q. Are you familiar with it? A. I have not reviewed with the Port Authority a breakdown of their operation into airport and other things. I don't know the figures.

Q. Do you know whether the airports have been doing better or worse than they used to do? By used to, to take a time period, three years ago. A. I don't know. On the one hand there has been a lot of capital improvement at Newark. On the other hand there has been the effect of recession here on air traffic.

Q. So you don't know. A. I don't know.

Q. Do you know about the impact of energy developments on the traffic patterns at the bridges and tunnels? A. I received some overall information on that a year ago when the energy crisis was at its height; and it seems to me that for a time there was a decline of something like ten percent. But this taxes my memory as far as being exact is concerned.

Excerpts from Testimony of John F. Thompson

Q. But your recollection is there has been some deterioration in the revenues from the auto traffic? A. There was during that period. I think, and I am not sure I can cite a source for this, but I think it has pretty much come back to where it was. T 340-1 to 340-25.

[351] By Mr. Landis:

Q. In discussions that led off with regard to a credit report issued in January of 1962 with regard to the 19th series of consolidated bonds of the Port Authority, Mr. Sovern asked you and it is at page 211, line 10, Mr. Sovern asked you, "Did the 19th series contain a covenant?"

And you responded, "No, because the covenant had not yet been passed by the two Legislatures."

Is it also true that there was no legislative power to take over the Hudson & Manhattan at that time? A. That is true, the legislation authorizing the takeover of the Hudson-Manhattan had also not been passed.

Q. I show you a copy of the Port of New York Authority official statement in connection with the issuance of the 19th series, the date of the official statement being December 22, 1961, and I ask you to read the last paragraph of the discussion on page 13 of that document, the discussion being entitled, "Hudson & Manhattan Railroad Acquisition and Improvements Study."

I ask you to read the last [352] paragraph. T 351-1 to 352-2.

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[354] The Witness: The paragraph reads, "The Port Authority has no present effective legislative power which would enable it to undertake the financing and implementation of this proposal."

Excerpts from Testimony of John F. Thompson

The status of the pending legislation on the subject is reported in the next subdivision.

Mr. Landis: Thank you, Mr. Thompson, we have previously had reference to the official statement that is contained in the stipulation, that official statement being the statement for the 41st series, which is the last series of bonds which had been commissioned by the Port Authority, a copy of which you have in front of you.

Would you refer to page 17 of that document and would you specifically [355] refer to the language that starts, "It is presently intended. . ." Just below the center of the page, and review that language over to the break in the middle of the next page.

A. I have read it.

Q. Do you recall having read that at the time that official statement was circulated? A. Yes, I did, sir.

Q. And in making recommendations with regard to the purchase of that series, did you rely on those statements? A. Yes, sir. T 354-8 to 355-13.

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The Court: Mr. Thompson, have you ever read a document which is exhibit 5 annexed to the stipulation of facts in this case which was a speech made by Mr. [356] Daniel Goldberg, the then general solicitor of the Port Authority, in October, 1964.

The Witness: Yes, I read it recently.

The Court: Do you recall having read it at the time or approximately at the time it was published in April of 1964.

The Witness: I don't recall specifically reading that at the time, sir. It was one of a series of

lectures to a section of personnel of the Port Authority and I am not sure it was distributed to some of the rest of us at the time.

The Court: Do you recall ever having conversations with Mr. Goldberg concerning the financial structure of the Port Authority in its economic prospects and the state of the bonds and the consolidated bond resolution?

The Witness: Your Honor, I am quite sure that I have had. I have known Mr. Goldberg for many years and I have had conversations with him on a number of related subjects and I am sure this must [357] have come into it.

The Court: Because during the course of this talk, he does make reference to the concerns of the financial community, and I am sure you would be included in that group.

In the reading of this document which you say you did recently, did you take note of some of the statements that he made to the effect—and his speech was given prior to the adoption of the covenant—that in fact under the existing statures and consolidated bond resolutions, there were no monies available within the Port Authority financial structure to finance any deficit rail transit operations.

The Witness: I remember that he made such statements, yes.

Q. Is that your understanding of what the effect of the statutes and consolidated bond resolution would be without the covenant?

The Witness: Would have been then or—

The Court: Now, irrespective of the covenant, is it

your understanding [358] at the present time that under the statutes which were in effect and are still in effect and the terms of the consolidated bond resolution pursuant to which these bonds were issued, that there are no monies available within the Port Authority structure which could be used for mass transit that are not already pledged to existing bondholders?

The Witness: I am not sure that without the covenant some of the money in the bottom line would not be so useable, your Honor.

[359] The Court: When you say the bottom line, what is it?

The Witness: The consolidated bond reserves.

The Court: That would be the only possible source of monies then for the use, or to cover deficits resulting from mass transit operations, which the Port Authority might undertake?

The Witness: Well, your Honor, that would depend on how the project was integrated into the Port Authority. As I said yesterday, I have seen no specific proposals from advocates of repeal [as] to just what their intention is. And I have heard many comments about sums like 100 million dollars a year and so on that give rise to fears that they are looking at something much further up the scale.

Then I don't feel at all confident to answer what would in effect take place.

The Court: Now, I call your attention to page 23 in this same exhibit in which Mr. Goldberg discusses—T 355-22 to 359-25. * * * [360] his interpretation and the effect of the Section 7 certification which you had indicated was a subjective test which

was not adequate to safeguard the interests of the bondholders. I would ask you to read it, because I am sure you would not recall the whole paragraph.

The Witness: No, I am reading it.

Yes, I have read it, sir.

The Court: Mr. Goldberg seems to view this Section 7 certification as being a very rigorous and precise one, and he ends up with the statement that this Section 7 certification has "helped to allay the fears of the financial communities."

I gather from the testimony which you gave us yesterday, particularly that [361] interpretation of Section 7, and also that you disagree with his conclusion that the financial community's fears were assuaged by the conclusion of this certification requirement.

The Witness: Yes, I think implicit in his statement at that time was the record of the Port Commissioners from the whole Authority up to that time of complete independence from political discussions. And I think that is implicit in what he says here. And since then there have been changes in that respect. Mr. Goldberg goes on later, as you know. In order to further allay the fears of the financial community he is forecasting the 1962 covenant.

The Court: He is advocating some form of covenant at the conclusion of his talk. That is certainly so.

The Witness: It pretty much outlines what the 1962 covenant became.

The Court: Now in order to perhaps help me in my understanding of what the financial structure of

the [362] Authority's bonds are, if you take a look at the bottom of page 21, and continuing over on 22, right to the bottom of 22—

The Witness: Right.

The Court: I have read this I don't know how many times. But at the conclusion Mr. Goldberg says that in point of fact the Authority would not be in a position under its then financial structure to be given a deficit operation and be called upon to pay the operating deficit and any debt service requirements which it might entail, because all of the moneys, all revenues, are the Authority's and were pledged for existing facilities or to outstanding bond issues.

The Witness: I think that is the substance of what he is arguing.

The Court: Do you agree with that?

The Witness: I agree that the pledges that he describes are accurately described. I do not believe that the situation through the Section 7 certification that he describes was sufficient to [363] satisfy the investment community that these things would not take place.

The Court: Now I am not concerned with the Section 7 certification. But what I want to know is whether you agree with what he seems to be saying here, that the Authority's revenues are already pledged pursuant to the statutes or the consolidated bond resolution so that it could not pay or would have no monies left to pay for any deficit operation that might be handed to it, by the action of the States.

The Witness: I think first he indicates that they will not take the money outside the Port Authority.

Then he goes on to document the fear that a group of deficit ridden railroads might be taken over, and that is what he reads into the Section 7 certification. The last paragraph on page 22 documents an additional fear that this might be done within the Port Authority. And then he goes on to speak of the Section 7 certification.

[364] The Court: Would you agree with his statement in that paragraph in the middle of page 22, that the Authority's revenues could not be used to subsidize the private railroads to the extent of their commuter operating deficits—estimates they were called in 1961?

The Witness: As matters then stood, I think that was probably correct, yes, sir.

The Court: Now if you could turn to that series 41 official statement—T 360-7 to 364-13.

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The Court: Page 62, where Mr. Sovern was asking you to read, and following up some questions which he had; again, I just want to find out what your interpretation of this representation is in the official statement.

As I read this, could the states give to the Authority, let's say the Delaware & Lackawanna and the Susquehanna [365] and the Erie Railroad for nothing, having acquired them by whatever means they did; and could revenues of the Authority which are pledged as described here then be used to pay any deficit resulting from such rail operations?

The Witness: Your Honor, I have reread this section since my testimony of that this morning, and I have to say that I am simply uncertain on it and

do not know what the legal outcome of such a controversy would be.

The Court: I am trying to isolate it. Assuming that they could not use any of these pledged revenues for such purposes, then the consolidated bondholders would really have nothing to fear, would they?

Because all of the revenues from all of these facilities as described there are pledged to the consolidated bonds.

And if you got down to Section 5 it is to pay the debt service on the consolidated bonds, and the balance is pledged as security for the consolidated [366] bonds, to be paid into the consolidated bond reserve fund, except such amounts as must be paid to the general reserves.

The Witness: Yes.

The Court: So assuming that the interpretation I think that Mr. Sovern was contending for this morning is correct, then none of the revenues of the Port Authority from any of the facilities which are mentioned in Section 4-i, could ever be used to finance a deficit transit operation, and that would be pursuant to the terms of the consolidated bond resolution.

The Witness: Your Honor, I am not certain that follows.

The Court: I realize you have some question in your mind. I have a question mark. We hope that it will be cleared up.

The Witness: If it does follow, I have no idea of why the effort was made to repeal the covenant. T 364-18 to 366-23.

[367] The Court: Again reading the same paragraph, and if you will make that same assumption,

the only way that revenues from any of the Port Authority's existing facilities could be used to finance the mass transit operation would be if the Port Authority were able to issue a consolidated bond to either purchase or rehabilitate or improve that facility. Is that right?

The Witness: That would be a way to do it, yes.

The Court: Now really doesn't the financial community have control over that situation?

I mean, the financial community has a lot of concerns and fears and so forth for the integrity of the covenants and for the security it has for its bondholders. But doesn't the financial community and its ability to reject the [368] offering of any bond by the Port Authority have ultimate control whether the Port Authority or the states can ever engage in this kind of mass transit operation?

The Witness: Your Honor, implicit in your question is a concept of the financial community as a much more unified thing than it is. There are many competing firms that do things on a variety of bases.

There are firms who would not hold out, as you say, if they could get a 9½ percent bond to sell on the basis of this, they could very well try to do it. This would be quite contrary to the interests of other bondholders who had gone before them. I think that is the difficulty. The financial community is not a unified organization. T 367-5 to 368-19.

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[369] Mr. Landis: Your Honor, may I have one question.

By Mr. Landis:

Q. Assume, if you will, Mr. Thompson, Consolidated Bonds that the Judge referred to only need be one $1,000 bond sold to anyone, the proceeds of which would purchase from the State of New Jersey all the deficit generating commuter railroads in New Jersey that are now privately owned, those railroads having been previously purchased for their market value by the State of New Jersey. T 369-2 to 369-11.

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[370] The Court: Given your experience with the integrity of the Port Authority Commissioners and the manner in which they have conducted themselves over the last what, fifty odd years, would you consider that to be a realistic fear, that the Port Authority [371] would issue a $1,000 bond of a consolidated —pursuant to a Consolidated Bond Resolution to bring into the pie the mass transit deficit operation? Do you think that they would ever do such a thing?

The Witness: Your Honor, ten years ago I would have answered certainly not. Today if you asked me about the Port Authority staff I would say certainly not.

We have noted from time to time that the Commissioners are under greater and greater political pressure in these matters. I cannot give you as strong an answer now as I would have before.

The Court: Would you say it would be unlikely?

The Witness: Your Honor, there has been so much going on in this thing that seemed unlikely to me from the start and unintelligent, the things that have been promoted in this field that it's somewhat unlikely. T 370-21 to 371-19

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Excerpts from Testimony of John F. Thompson

Recross-Examination by Mr. Sovern:

Q. So one of the fears the covenant protects against is the issuance of a $1,000 bond and the taking in of all the deficits. Is that correct? A. That is a hypothetical question which technically [372] I think fits into the provisions and would work.

Q. You say it would be somewhat unlikely that such a step would be taken, and, therefore, I take it, you believe that there is some risk that it will be taken. This morning you regarded as absolutely unthinkable that the States might make an arrangement with the Port Authority for a ten year support arrangement. Do you still regard that as absolutely unlikely, or is that somewhat unlikely? A. Now, this was a ten year voted covenant?

The Court: Right.

A. (Continuing) Yes, I still regard that as very unlikely because it doesn't fit together.

Q. That's more unlikely than that they would issue a $1,000 bond for the assumption of all the mass transit facilties in the metropolitan area. Is that correct? A. I think we might not attach too much weight to the $1,000. T 371-21 to 372-17.

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[382] (Exhibit S-21, Official Statement, 19th Series, was admitted in evidence.) Q. This was the official statement for the 19th Series, was it not, Mr. Thompson? A. Yes, so I understand.

Q. And you testified earlier on your cross-examination, the 19th Series was sold [with] no special charges for fears

Excerpts from Testimony of John F. Thompson

of special mass transit. Is that correct? A. I believe that's correct. T 382-8 to 382-16.

The Court: Could I ask you one question? Has Moody's changed its rating of Port Authority bonds since back in 1971 or so?

The Witness: No.

The Court: It is still A today?

The Witness: Still A today.

The Court: Has Standard & Poor's [383] changed its rating of the Port Authority bonds since 1971?

The Witness: I believe not, your Honor. T 382-19 to 383-3.

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Excerpts from Testimony of Lester Murphy, Jr.

LESTER V. MURPHY, JR., James Lane, Lloyd Harbor, Long Island, New York, sworn.

Direct Examination by Mr. Landis:

Q. Mr. Murphy, by whom are you employed and in what capacity? A. Barr Brothers & Company, 40 Wall Street, vice president of the firm responsible for trading positions in dollar bonds.

Q. What is your educational background, Mr. Murphy? A. Colgate University, 1949, graduated with a BA.

Q. How long have you worked in the municipal bond field? A. Twenty-five years.

Q. When did you begin your employment with Barr Brothers? A. October of 1950.

Q. And what is your present position with [384] Barr Brothers? A. I am a principal in the firm. We are now a corporation. I worked in the Trading Department. As I say, I am responsible for the dollar positions and also cover institutional accounts.

Q. When was Barr Brothers incorporated? A. 1971.

Q. And what was your capacity prior to that? A. Prior to that, we were a partnership. I was in partnership in the firm from, I believe, it was 1959; basically involved in the same capacity as I am now.

Q. And you are presently a stockholder in the firm? A. Yes, I am.

Q. Is it privately-held? A. Yes.

Q. And prior to reaching the position of partner in 1959, what were your duties and areas of responsibility? A. I started as a trainee, in 1950, started from there; became a junior trader and then into institutional sales.

Q. And since 1961, what have been your responsibilities, your duties and areas of responsibility? A. Again, in the field of responsibility in the trading position of the firm.

Excerpts from Testimony of Lester Murphy, Jr.

[385] Q. What are your day-to-day activities in that posture? A. Well, I sit at a training desk that is a long table with a lot of direct wires to banks, other major stock exchange firms, municipal bond dealers and maintain markets in several hundred issues of municipal bonds, much like a specialist might be on the New York Stock Exchange.

Q. What are the areas of business that Barr Brothers does? A. We are involved in underwriting municipal bonds and dealing in municipal bonds in a secondary market.

Q. Do I understand your testimony to be that you are involved in the dealing operation, the secondary market dealing operation? A. I maintain an active market in roughly two hundred issues, yes.

Q. What is the size of the firm? A. Total employees, we are relatively small, about 35 employees, we have slightly in excess of two million capital, principally amongst four principal stockholders.

Q. How old is the firm? A. Over fifty years old.

Q. How would you characterize the status of the firm in the municipal bond trading in the secondary market? T 383-8 to 385-25.

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[386] A. We maintain, I'd say, daily trading positions that range anywhere from five to eighteen million. I'd say that our current inventory positions have been running around twelve or thirteen million bonds.

Q. Are you a large or a small trader, how would you characterize it? A. I'd say in the secondary market, big traders.

Q. How big compared to the other traders? A. I'd say in the field of dollar bonds, I regard ourselves as probably in the top three as for dollar volume business.

Excerpts from Testimony of Lester Murphy, Jr.

Q. Who are the other two? A. Salomon Brothers and Weeden.

Q. Are they competitors of yours? A. Very highly competitive.

Q. Describe the clientele of Barr Brothers? A. Well, our clientele, as I say, I sit at a trading desk and probably speak to or handle two hundred phone calls a day and the type of people I would talk to would be banks, [387] trust companies, other major municipal bond dealers as well as large stock exchange firms.

Q. I believe you said that Barr Brothers is considered the dealer in the business? A. Correct.

Q. Do you deal with brokers in the business? A. Well, to give you an insight as to what a dealer is, we maintain markets and we deal with our own capital and if we position bonds, it is for our own accounts. We attempt to buy bonds naturally at a spread whereby we can make a profit, very much like somebody that is in a used car lot, who is standing there and looking at cars coming in, willing to make a bid, hopefully, to sell them at a profit.

We are standing in a marketplace every day maintaining active markets, providing a function of making markets and hopefully intend to make a profit on the spread. T 386-7 to 387-16.

[390] Q. Do you deal in bonds of the Port Authority of New York and New Jersey? A. Yes, we do.

Q. Is your clientele in this regard local or national? A. National.

Q. Do you specialize in particular bonds?

Does the firm specialize in certain bonds? [391] A. We tried—we have developed a reputation of being very active in what we call the dollar bond market, which encompasses most of your toll roads, power authority type facilities,

Excerpts from Testimony of Lester Murphy, Jr.

Port facilities, bonds of that nature which were issued in term form and are traded in dollars as opposed to being traded on a yield basis.

Q. When you say you make a market, what does that term mean? A. A market would entail offering to the caller the bid side of the market and the offered side of the market and the size which is of very important consideration in making the market; not that the quote is in 85 bid offered at 86, how big is that market?

Q. In other words, you mean the size of the commitment you are willing to make when you make the market? A. Size of the market is part of the market. Very often you might have a market that is 85-6, but it is only good for $25,000. Whereas in other securities it might be good for a million dollars. So size is as important a consideration in the market.

Q. How long has Barr Brothers been dealing in Port Authority bonds making the [392] market? A. I would say since the late '40's.

Q. How much trading volume has Barr Brothers done in the course of the day's trading in Port bonds in the secondary market over the last three years? A. I would say that our daily turnover in volume is approximately a total of about two-and-a-half million. And I would say that our Ports turnover can range anywhere from 100,000 in a day to one million and a half. But I would say on an average it is probably more like in the neighborhood of ten percent of our total turnover.

The Court: Which would be what?

The Witness: On say two-and-a-half million dollar turnover—

The Court: $250,000?

The Witness: Yes, $250,000, but depending upon the activity of the market in certain issues.

I mean, we might trade two million Ports in one day. It is a fluctuating situation.

Q. Does your firm deal in Port Authority bonds in greater volume than others? [393] A. I could not answer that. I sort of pride ourselves as being one of the three most active firms in that field.

Mr. Landis: I offer the witness as an expert here.

The Court: Are there any questions on qualifications?

Mr. Sovern: No. T 390-17 to 393-8.

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[394] By Mr. Landis:

Q. Mr. Murphy, you, of course, are aware that this litigation involves the repeal of the 1962 covenant of the Port Authority that controls the Port Authority, are you not? A. Yes, I am.

Q. What is your general understanding of what that 1962 covenant involves? A. My general understanding it limited the scope of mass transit for the Port Authority.

Q. Are you familiar with the covenant in any greater detail than you just described? A. The covenant?

Q. The 1962 covenant. A. No, nothing more than that.

Q. In your business are you in any way involved in the analysis of municipal bonds? A. Well, as I said before, we are making positions for our own account in a greater number of issues and we try to keep abreast of the current financial positions of all the issues that we deal in.

Q. Meaning the trading situation? A. Well, we keep—we receive naturally [395] earnings statements from the

toll roads, the power facilities and other agencies in whose securities that we trade. So we try to keep abreast of the financial situation in everything that we deal in. If there is a situation that appears that it's faltering financially naturally we want to be aware of this.

Q. In 1973 did Barr Brothers own any Port Authority bonds? A. Yes, we did.

Q. You own any now? A. Yes, we do.

Q. What effect did the repeal of the 1962 covenant that took place early in 1974 have on Barr Brothers' attitude toward the Port Authority bonds?

The Court: June of 1974, be more precise, the repeal became effective.

Q. (Continuing) Well, the process that became effective in June of 1974. A. Well, as I recall we were hopeful at the time that Governor Wilson would veto that, because we felt that if the covenant was repealed we felt it would have a very poor effect on the [396] market and we have always maintained the positions both long and short in Port issues, but when Governor Wilson signed that he signed it with, as I understand, remember reading in the press, with a fair amount of reluctance and hoped that the decision could be finally settled in the courts.

With the idea in mind that the Port Authority would become more involved in mass transit we were extremely cautious about our positions, and I'd say adopted a much more conservative trading attitude as far as our positions in Port bonds.

Q. What do you mean by "extremely cautious" and more conservative trading attitude? A. Well, on the initial signing by Governor Wilson or right after the signing of this repeal we noticed that there was a number of Port bonds

that seemed to be offered for sale in the market, and in appraising our markets every day and looking to whom buys and sells the securities, we felt that the market trend was down, and we tended to take a very cautious position as far as how many bonds we were long and tried to play the market on what I would say was the short side.

Q. Would you explain that, the short side? [397] A. A short sale is selling a security that you don't own, hope to cover it back at a profit. In other words, in maintaining a market if a market was 85-86 and if we could make a sale at 85½ without owning the bonds we would make that sale with the hope that the market would decline and cover that bond back in at a profit.

Q. Does the term "spread" have some relationship to your operation? A. Well, spread refers to profit margin. I would say that we wanted more spread, more profit margin than any commitments that we took in Ports, because the market was subject to a fair amount of selling in Port bonds.

Q. Why did the repeal of the covenant change Barr Brother's attitude towards Port bonds? T 394-1 to 397-17.

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[398] The Witness: Well, I would say that with the repeal of the covenant it was paramount in most people's minds that deal in these securities that there was a breach in the contract, and we felt that with a breach in the contract that, first of all, it was something I don't think I've experienced since I've been in the business, and secondly, we felt that the spread in the Port Authority operations into greater mass transit would have a very poor effect on the performance of their bonds, and that other institutions indicated that to us, and that, therefore, we adopted

a position of much more conservative, much more conservative attitude towards our long positions.

[399] Q. You spoke of investors. What effect did the repeal have on the attitude of investors towards Port bonds? A. Well, part of their function in the marketplace is to try to track certain relationships of various dollar bonds. We don't do any professional analysis or advice in the form of investment counselling. We merely provide markets and spread relationships, and we have found that for many years that you could, when certain spreads develop, that you could talk a customer into selling a bond and buying, let's say Ports, but we found that subsequent to this repeal of the covenant, that most of the major institutions that we did business with, and I wouldn't say most, I don't know of any that would then buy Port Authority bonds. They crossed it off their list.

Q. Did you have any direct communication with those institutions? A. Yes. T 398-9 to 399-20.

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[401] By Mr. Landis:

Q. And the investors that you communicated with, without identifying what they said to you, what was the nature of the communications?

The Court: What was the subject matter?

Q. (Continuing) The subject matter. A. Well, as I said we attempt to provide a service to institutions whereby we are calling markets, showing spread relationships.

We found that institutionally Port Authorities were no longer an acceptable exchange in that the investor, institutional-type of investor, sophisticated type investor would

not any longer buy Port Authorities. If he was to sell a Kansas Turnpike or Indiana Turnpike wheretofore he would [402] buy Ports when a certain spread relationship developed, he no longer would buy Ports.

Q. Without trying to name every one, which institutions do you refer to, what are the names of them? A. The names of the accounts?

Q. Yes. A. Well, I'd say Fireman's Fund, which is a large insurance company in San Francisco, major banks in Chicago, the First National Bank of Chicago, major banks in New York City, Bankers Trust Company, First National City Bank, insurance companies, the Connecticut General, the Hartford Fire Group and others.

[403] By Mr. Landis:

Q. And those have been customers over the years as to Port bonds? A. That's correct.

Q. You indicated in your testimony that there would be exchanges, you gave some examples. Do those have a name, those exchanged, trades? A. Swaps.

Q. Exactly what does that entail and what are the reasons for it also? A. Well, to try to be simple, if that investor was able to sell, say, a million par value bonds at 80 and buy a very similar bond quality-wise intrinsically at 75, he might very often make the trade because from the proceeds from the sale, he is able to buy more bonds and therefore increase his income and in the case of the Ports, the spreads had widened to, in some of the trades, I recall, to 15 points or more but it was no longer a question of spread relationships. It was a turndown of the security based on how good the investor thought the intrinsic value of the Port bond had become after the repeal.

Q. In other words, despite the increased spread, you could not interest people in [404] taking back Port bonds? A. Correct.

Q. Do you have an example of that, could you give an example? A. The names I had cited that had normally been [buyers of] Port Authority bonds, no longer would consider them as a fair, acceptable return.

Now, Bankers Trust had a large swap in November of last year and they would not take anything, they wouldn't take any Ports back. Anybody who sold Ports that we did with major trust companies for tax swapping purposes, did not buy Ports back. They were willing to sell the bonds, but they were not willing to buy them back.

Q. You previously referred to the impact of the repeal on the price of the Port Authority bonds. Would you explain that in more detail? A. Well, the repeal, as I say, changed not only our attitude but changed the institutions' attitude about whether or not they were willing to own this bond with the threat of the Authority becoming involved in mass transit.

Now, most institutional investors and most people in our business, historically, know that [405] mass transit financing of which there have not been that many, but the ones that I am familiar with, most of them got in serious trouble.

Bi-State, which is a joint agency between Illinois and Missouri sold a bond for the purposes of mass transit. Those bonds are presently in default. Chicago Transit Authority had severe difficulties with their debt and I found that the word "mass transit" or "transit facility bonds" is one that literally shows deficits and widening spread, so that the quality of the bond, I find, is unacceptable institutionally.

Excerpts from Testimony of Lester Murphy, Jr.

Q. During this time of price decline that you referred to, what other factors were at work? A. Well, as I said before, I said that one of the factors was that it was a change in the investor's attitude on what he believed was a contract between the states and that he felt that if they could do this with this bond and become involved with mass transit, even though it might have to involve a certain coverage test, it was a politically dangerous position because, as we all know, the subway fares, etcetera, are more or less sacrosanct and I think anyone who is familiar with or following [406] the MTA, has recognized that they are in deep financial problems. Also, I think that a major change in the thinking was that the last experience we had along this line was the Triborough Bridge & Tunnel Authority which hoped to alleviate some of the MTA's financial burdens and they went to the bondholders, obtained a two-thirds vote of the bondholders, offered the bondholders a quarter of one-percent over the existing interest rates on the outstanding bonds and closed the lien so that the MTA would then be able to get the surplus over a 120 coverage so that this was a radical departure, I'd say, from the previous type changes that I have seen made in bond indentures.

[407] Q. You referred to the size of the market in bonds since repeal. Could you explain in detail what you meant? A. The size of the market I would say immediately after the repeal was quite active. I would say that there was substantial selling of Port Authority bonds. As time went on it became increasingly heavier, particularly at the end of the year, because a number of institutions and fiduciaries availed themselves of the opportunity of selling Port bonds to establish tax losses. But the market had been extremely thin. Most dealers were not willing to position much in the way of Port bonds because of the outlook of the Port entering the mass transit field.

Excerpts from Testimony of Lester Murphy, Jr.

Q. Let me direct your attention specifically, to the Port bond issues commonly called the 6's of 06 and 08. Are you familiar with those? A. Yes I am.

Q. In fact those are issues that have their final maturity, the maturity in the years 2006 and 2008 and issues with a coupon at 6 percent. Is that correct? A. That is correct.

Q. Can you take the period now from the time of repeal where you had testified to the condition of the market since that time, take the period from then until December 1974; can you characterize the activity of the [408] prices that were bid for those bonds? A. I would say that in general—

> Mr. Sovern: Exactly what dates do you have in mind?
>
> Mr. Landis: From the period roughly of June 1974 to December 1974.

A. I would say that the market in general of Port bonds experienced a rather severe decline. T 401-10 to 408-8.

• • •

Q. Could you characterize the change in price, if any, of the bids for those bonds in the period from December 1974 until today? A. The bonds have had a very, very substantial recovery. I would say that from the middle of December until the present time has been a 20 point recovery in the bonds.

Q. Compared to the general activity of the market during this time, could you characterize the decline and the rise that you have just described? [409] A. I would say that the decline was naturally greater during the period from June through December than the rest of the market. The turn arounds from the first of the year to the present time has been substantially better than the rest of the market.

Excerpts from Testimony of Lester Murphy, Jr.

Q. Can you explain the variations? A. Well, as I have stated before, most dealers, like ourselves adopted a cautious long position. However, most dealers fearful of the tax selling in the bond particularly adopted a position where they were short the bonds. The markets were quite thin. But most dealers like ourselves had rather large short positions in these bonds.

Now, coupled with the lack of selling when tax selling ended at the end of year, coupled with the Federal Reserve's position on money, their posture of easier money, what happened was that dealers who were short these bonds scrambled to try to cover their short position.

So what you had there was a technical situation in the market where a number of dealers were short Ports. Tax selling subsided at the end of December. The bond market took on a strong tone.

Q. You say the bond market, do you refer to the bond market in Ports or generally? A. Generally.

But this accentuated the upward movement of Ports, [410] because I think that people who own Ports now are willing to await the outcome of this case recognizing it was rather imminent.

I think the people who decided to sell sold many months ago. The rest of them are gambling that the Courts will find in their favor. And I have not seen any supply of bonds come into the market. We as dealers cover short positions. It cost us in excess of ten points. T 408-17 to 410-8.

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Q. Would you characterize the upswing that you just described in prices since December 1974 of the Port 6's of 08 and 06? A. Characterize the upswing?

Q. Yes.

The Court: He has.

Excerpts from Testimony of Lester Murphy, Jr.

A. It was a thin market. There was a change in Federal Reserve's posture on money and dealers short covering, a technical situation.

Q. Could you give it a name? A. As an example, I think this might be important, the most dramatic movements on the up side have been in the more second grade quality paper. Jersey Sports which was [411] 7½ percent bonds that had been selling in December at 65 and recovered to 80 today. Urban Development Corporation—New York State Urban Development Corporation, a bond that is under a cloud that had substantial recovery again for the technical reasons I cited about the Ports. So your poorer quality, less regarded tax exempts, that had the slowest recovery because of a technical situation.

Q. Is there a name that describes this adjustment that happened in the prices? A. Is there a name?

Q. Yes. A. I just characterized it as short term technical situation.

Q. Which is what your testimony has been; in other words there is no other magic name.

Has the repeal had any effect on the attitude of investors with regard to other bonds other than the Port Authority? A. Certainly, the number of institutions whom I have cited feel that if a covenant was to be repealed, a so-called contract with the issuing states, the concern now becomes increasingly more acute for bonds that are so-called moral obligation bonds.

In the case of moral obligation bonds the [412] problem is whether the legislatures will appropriate the needed funds to keep them in business. So, I think that the overall position that I have found from the people as a market maker that I talk to from day to day to day is one of increasing greater concern about how good the contract is that they

are buying, and I think will lead to much higher interest rates.

Q. Did the effect go even beyond the moral obligation bonds? A. Yes. There was an issue of Power Authority bonds that sold within the last two weeks a $150 million issue that normally would have much greater national acceptance than it did. The acceptance was hurt.

Q. Did your firm participate in the underwriting of that bond? A. Yes, we did.

> The Court: When you say Power Authority, do you mean the New York State Power Authority?
>
> The Witness: Yes, New York State Power Authority.

Q. I show you exhibits that have been marked P-94 and P-95. You are familiar with these are you not? [413] A. Yes I am.

Q. You have seen these before. Yes.

Q. Were the bond issues shown on those documents chosen at your suggestion? A. Were these chosen at my suggestion?

Q. Were they placed there at your suggestion? Was that your thought to create that? A. This particular chart?

Q. Yes. A. Yes sir.

Q. It refers to Kansas and Indiana Turnpike bonds, does it not? A. Yes, that is correct.

Q. Could you describe those issues? A. They are toll road facilities dependent upon the net revenues of the facility to service debt. Traffic naturally would determine the toll revenue income.

Q. Did the issues have similar characteristics to the issues of the Port Authority of New York and New Jersey that are shown on the same P-94?

A. The bonds have similar coupons, similar maturities, similar average life, dependent upon toll revenues—I think they have great similarity.

A number of trade swaps have been done in the past between Port issues in Kansas and Indiana; it has been a very common trade in the past. In a tracking relationship, as you can see here, there is quite a bulge that develops subsequent to the repeal.

Q. Would you consider upon the basis of the knowledge you have expressed and upon the illustration of the movement of bid prices from January 1974 to June 1974, that the issues shown on P-94 are comparable? A. They appear to track pretty closely, yes. T 410-13 to 414-16.

[415] Mr. Laulicht. • • • I would like some voir dire on these documents before they're introduced. T 415-11 to 415-14.

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[417] Mr. Laulicht: Now, you testified, Mr. Murphy, that in January of 1974, you would have regarded Kansas Turnpike issues as roughly comparable to these Port Authority issues. May I ask you whether the Kansas Turnpike, did it run a passenger railroad?

The Witness: Not to my knowledge.

Mr. Laulicht: To your knowledge, did the Port Authority run a passenger railroad on January, 1974?

The Witness: Did the Port Authority?

Mr. Laulicht: Yes.

The Witness: Yes.

Mr. Laulicht: Was that a deficit producing operation?

The Witness: It is. I don't know if it was known at that time.

Mr. Laulicht: You are not sure [418] whether in January, 1974, PATH operated at a deficit?

The Witness: They did, but I can't tell you what it was.

Mr. Laulicht: To your knowledge, did the Indiana toll road run a passenger rail deficit facility in January, 1974?

The Witness: No.

Mr. Laulicht: Did the—either the Kansas Turnpike or Indiana toll road operate a World Trade Center in January, 1974?

Mr. Landis: We will stipulate the whole series of questions Mr. Laulicht is asking.

The Court: How do you know?

Mr. Landis: I suspect that they did not have three airports, they probably did not have tunnels under interstate rivers.

The Court: What is your point?

Mr. Laulicht: My final question was this: Doesn't the fact that the Port Authority runs a World Trade Center and I take it you're familiar with the problems [419] of the World Trade Center, it runs a deficit railroad and it ran that in January of 1974,

doesn't that tend to make these two issues not comparable?

The Witness: Well, first of all, the Port Authority shows that net revenue, I don't know how you take down their revenues, but they show net revenues on a comparable earnings basis for the facilities. I would consider them comparable.

Mr. Laulicht: I don't understand what you mean "a comparable percentage of revenue." Do you mean to show—

The Witness: The point is if the Port Authority shows 20 million dollars in net revenues this year, I am unable to break down how much is lost in the World Trade Center and how much is made in the airport facilities. I regard the net revenue, the bottom line as a consideration.

Mr. Laulicht: Irrespective of the type of operation that is involved?

The Witness: I would say—

Mr. Laulicht: As long as the [420] bottom line is satisfactory, you feel that is the way to judge a bond. Is that correct?

The Witness: As long as the bottom line, as the bond was presently constituted, yes. I would have considered them equal bonds at that time. T 417-6 to 420-8.

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[421] The Court: Irrespective of the spread that may have existed between [them, they], would be comparable in terms of investment quality and in the demand by institutions for these bonds or their willingness to purchase these bonds.

The Witness: I would say yes.

Excerpts from Testimony of Lester Murphy, Jr.

The Court: And didn't you also testify something to the effect that you arranged swaps by institutions for these bonds or their willingness to purchase these bonds.

The Witness: I would say yes.

The Court: And didn't you also testify something to the effect that you could arrange swaps between these bonds with your institutional clients because they were roughly comparable in the minds of the buyers?

The Witness: That's right.

The Court: That is enough to qualify the exhibits. T 421-2 to 421-23.

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[422] *Direct Examination by Mr. Landis Continued:*

Q. How would you characterize the relationship that is shown on P-94 to have existed between the bid prices on June, 1974, through January of 1975? A. It shows a much greater spread. It appears sometime in June that the bonds no longer tracked. T 422-5 to 422-11.

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[424] The Court: See, they both seem to track roughly on this chart right even into July, don't they? And indeed while the spread may have been widening there through the end of July they're still tracking.

Now, you get the real significant difference in the spread once you get into August where they are really diverging. Now, my question to you, Mr. Murphy is this: Do you know of any external factors affecting the Kansas Turnpike and Indiana Toll bonds between, say, mid-August and mid-November

Excerpts from Testimony of Lester Murphy, Jr.

of 1974, which would have accounted for their increasing in prices?

The Witness: Well, there were—

The Court: Were there any developments on there?

The Witness: You mean as far as [425] changes in their indenture or something to that effect?

The Court: Whatever.

The Witness: Well, the only thing that I can add to it—there was nothing in the way of a change in the bond. The only thing that probably created a greater upswing in those markets was that there was some debt retirement that occurred during that period. The debt retirement that occurred during that period, however, in looking back on it, they were always able to buy bonds on debt retirement under the market. In other words, if a sinking fund was to retire five hundred bonds in a month and the quote was let's say 70-72, it appeared that the sinking fund would be able to buy the bonds under the market. We were in an overall declining market, and a number of institutions were liquidating Kansas and Indiana's, but you did have a sinking fund operation that occurred in that period in that they did buy bonds for retirement.

The Court: All right. So that you are saying that that was one factor that might [426] have caused an increase in those bonds. Right?

The Witness: Yes. But the—

The Court: All right.

By Mr. Landis:

Q. Are you speaking, Mr. Murphy, as to the specifically sharp rise from August to November 1974, in those bonds?

Excerpts from Testimony of Lester Murphy, Jr.

A. I believe roughly that's what the Judge was making reference to, yes.

The Court: Yes, that's what I was making reference to.

Q. Now, characterizing the general trend from June or, perhaps, May of 1974 to the end of, almost the end of January, 1975, let me ask you to repeat your characterization of the general trend. I believe you previously characterized it, but just to lay a foundation for my next question, let me ask you to characterize that general trend.
A. During what period?
Q. From May or June, if you will, of 1974 through January of 1975?

Mr. Sovern: The end of January?
Mr. Landis: The end of the chart. A. Characterize the market for Port bonds?

[427] Q. No, characterize the difference, if any, in the trends of the Turnpike bonds as opposed to the Port Authority bonds all as illustrated on the chart. A. Well, I think the chart speaks for itself, that you had a widening of the tracking. It got extremely broad, I guess, in the months of September and October, and towards the end of December and January you still had a considerably wider tracking, let's say, than historically was the case.

Q. Do you have an opinion as to what external factor caused that wider tracking between the bid prices of the issues? A. I think I testified to that, that we have found that the Port Authority bonds were no longer acceptable on tax swaps. T 424-8 to 427-16.

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Excerpts from Testimony of Lester Murphy, Jr.

[433] [By Mr. Laulicht.] Q. You gave us several reasons why you thought the repeal of the covenant had had an adverse effect, and if I may summarize them, I believe you said that it was the fact that a contract was breached, and to your knowledge that had never happened before, that the increase in Port Authority involvement in mass transportation was not regarded favorably, and then you made some reference to what some other institutions told you and we, I think managed to keep [434] that out of the record. Which of those three would you rate as the most important?

The Court: Most important in relation to what? Let's define that.

Q. (Continuing) In terms of the adverse effect that the repeal of the covenant had?

The Court: On the secondary market?
Mr. Laulicht: Yes, on the secondary market.

A. It would be very hard to break down. When you break a contract down how an institutional investor would weigh that in terms of comparing it with getting the Port Authority involved in mass transit, I know both of them are red herrings. I know that when you mention "rapid transit" or "mass transit" to an institution it's entirely unacceptable, because it's demonstrated that the transit systems throughout this country are largely operating at deficits, and the institutional and professional investor is greatly concerned with security today. He doesn't want to buy something that's possibly going to cost him a lot of money.

Q. Well, why did any investor buy a Port Authority bond since 1962 if he didn't want to [435] get involved with something that had to do with mass transportation, and if

it's such a bad word? A. Well, I don't think that the history of the Port Authority has been revolving around mass transit. It's been a well-run, well-organized, well-managed Authority. It's continually shown good revenues.

Q. Is the fear then that by the repeal of the covenant the Port Authority now is going to be suddenly completely enwrapped in mass transit? A. No, I think that the fears, I think I've previously testified to, is that it's a—it's an abrogation of an agreement, it's a contract. It's as if I went and bought a car from General Motors and had a twelve month warranty, and all of a sudden they announced that it's only good for six months. I don't think that I'd buy another General Motors car. And I think this is the feeling in the investment community.

Q. Now, you testified, Mr. Murphy that one of the reasons for the increase in the price of Kansas Turnpike bonds and Indiana toll road bonds as reflected on P-94 was the fact that there was some sinking fund activity. Is that correct? A. Correct.

Q. Can you tell us how much of that [436] increase was attributable to that sinking fund activity? A. I think I can document that the purchasing that the sinking funds did was either at the market or below the market.

In a sense, if I could explain that, Judge, if you had a market that was quoted 70-72 and the trustee entered the market for an offering of 500 bonds he, quite frequently bought bonds at 69, indicating a number of institutions were selling the bonds, because they were too high, and these markets were basically small markets. It was one way that an institution can unload a lot of bonds.

Q. Institutions aren't unloading Port Authority bonds now, are they? A. No. To my knowledge, they're not, no.

Q. That means that the present price is not regarded by them as too high yet? A. My only feeling there would be,

I think, that they're hopeful that a decision would be such that they won't have to. T 433-18 to 436-20.

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[438] Q. Can you explain to me how it is that the price of Port Authority bonds appears to be in the low 50s in the July period, and it has gone up to 55 as I read this by the end of October. A. It was obviously a tracking in the market or an up tic there. These markets do not continue to go one way all the time.

Q. Didn't you tell me how demoralizing the market in Port Authority bonds was back through the end of the year? A. I characterized the market as having substantial selling immediately after Governor Wilson's signing the repeal. Subsequent to that, dealers like ourselves maintained a low profile as far as long positions. The markets were extremely thin. As [439] evidenced by what has happened in the last month, we have had a 20 point increase on very little supply. So when we talk about markets we're not only talking about quotations, we are talking about number of bonds traded, the size of the market which is more of a key factor than the quotes. T 438-11 to 439-6.

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Q. Isn't that what you are saying, that the bond prices don't matter very much if you don't know the [volume]? A. If you were in my business and you made that statement you would be out of business in a hurry. T 439-12 to 439-16.

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[443] Q. Let me ask you this: Assume that I show you that there are variations in the spread from week to week on P-95; do you feel anyone of them by themselves is significant or is going to tell us something? A. I think P-95 is merely a compilation of the numbers that appear in this

period. I think I testified that there was a wider divergence that has developed since the time of the repeal. I have also testified institutionally where we have made swaps with institutions out of Kansas and Indiana's into Ports is no longer an acceptable trade. T 443-3 to 443-14.

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[444] Q. As far as you are concerned, was the decision of the institutions not to buy Port Authority bonds anymore than their own investment decision, that is all that represents. Is that not correct? A. That's correct.

Q. As it turns out, assuming that that was the investment decision of the institution in December 1974, as it now looks, how would you characterize the wisdom of that investment decision? A. I would characterize the thinking as completely unchanged. I am unfamiliar with a major institution that would buy Port Authority bonds today.

[445] Q. That was really not my question. My question was wouldn't they have made money if they had another investment decision? A. Institutions don't usually buy and sell to make money. They buy for intrinsic value return. They don't buy and sell something out usually at a point or two profit over a week or two's time. They try to keep their money invested at all times.

Q. You talked about a 20 point profit since December, did you not, Mr. Murphy? A. No, I said—I said yes, there has been a substantial improvement in the price, correct.

Q. Doesn't the swap list concept constitute the playing of a point here and a point here, not twenty points, but a point here and point there? A. You are talking of a swap out of, let's say, Kansas or Indiana?

Q. Yes. A. A swap off of Kansas or Indiana—

Q. That is not my question. My question is you answered a prior question saying that institutions are not interested in a point here and a point there. If that is

true, why do they engage in these swaps you are talking about? [446] A. Let me explain that to you, sir. The swap would involve the sale usually of a fairly-large amount of bonds, let's say a million Kansas Turnpikes, at which point if the spread had tracked historically where you normally had a ten point spread and institutions could sell a million Kansas and then buy an issue that was done to a twenty point spread, it would be a very attractive swap, but once you have removed this Port Authority bond as an acceptable swap, the presentation of the spread means nothing.

We have presented these swaps and in a number of cases we are told by institutional accounts we won't buy anything in the New York or New Jersey area.

Q. In other words, Barr Brothers has recommended the purchase of the Port Authority bonds as a part of a swap, has it not? A. We have not recently because our history, as I explained back after the signing of the covenant was such that you don't call up a customer every day and say, "Would you mind buying Ports today," if he told you he won't touch the Ports.

Q. At some point you suggested a swap that would have involved the purchase of Port Authority bonds and from what you are telling us, is [447] even a 15 point difference was not enough to make the deal? A. Correct.

Q. But wasn't your bringing that swap to your customers' attention something that you thought would be to the benefit of your customers? A. We have not brought those types of trade to our customers, as I explained to you earlier. We no longer have accounts that buy Ports. T 444-13 to 447-9.

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[448] Q. Let me put it to you this way, would you recommend as part of a swap an investment security that you

Excerpts from Testimony of Lester Murphy, Jr.

considered a dog? A. Would I?

Q. Yes.

The Court: Depends on to whom.

Q. The Banker's Trust Company? A. That would be absurd, they have people who are doing research work, their own analytical staff. First of all, as I say, we don't do business, to speak of, with individuals. If we do one to ten percent of trade, we do trades with additional people who know what the hell they are buying and selling.

Q. Except they are gamblers, as you told us, they are professionals, but they are gamblers? T 448-9 to 448-25.

* * *

[449] Q. Didn't you testify that the people who are now holding the Port Authority bonds and have had a 20 point increase are gambling as a result of this suit? A. No, my testimony was there has been a lack of institutional selling here. Hopeful that this decision will go in favor of the U.S. Trust Company.

Q. Did you use the word "gambling" in this connection, Mr. Murphy? A. Gambling on the outcome of the suit, possibly, I did. T 449-6 to 449-16.

* * *

[450] Q. Let me show you some documents or some news stories fairly quickly.

S-1 is an article that appeared in the Wall Street Journal about the World Trade Center. T 450-21 to 450-24.

* * *

[451] Q. Were you aware of that story at the time, Mr. Murphy? A. That particular story? I cannot testify to that particular story. I have certainly been apprised that the World Trade Center is behind in some of its plans, yes.

Excerpts from Testimony of Lester Murphy, Jr.

Q. As far as you know, have those news stories, similar to what I just showed you in S-1 with respect to the World Trade Center had an adverse effect on the market price of Port Authority Bonds? A. Your question is whether these adverse stories on the World Trade Center, has it had any effect?

The Court: Adverse effect.

Q. Adverse effect on the bond price of the Port Authority in the secondary market? A. To a limited extent, it must have, yes. I can't think for every institutional investor, but I would say if it was I, I think it would.

The Court: Do you have any recollection of discussing the Port Authority problems with the World Trade Center with any of your institutional clients or [their] referring to any news stories in their conversations with you?

[452] The Witness: The only thing, Judge, that I can recall discussing was that the World Trade Center was experiencing some difficulty in renting space, but also that they anticipated to throw off $20 million to the revenues of the Port Authority.

Now, how they arrived at their costs, etc., I cannot answer those questions. T451-4 to 452-7

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Q. I would like you to pay some attention, if I may, to S-2. This is an article that appeared either on the front page of the Sunday Times or the front page of its financial section in November 1974, a very lengthy article as I am sure you will note. It is headed, "Port Authority has Fallen on Hard Times."

Do you remember reading this article a few months ago? A. I didn't particularly read it. I was familiar with it at

the time. [453] Q. How did you become familiar with it if you did not read it? A. In our office every day, we talk about this kind of news.

Q. What kind of discussions did you have in your office about this article? A. Well, just a general discussion as outlined here.

Q. Did you think that this article might have an adverse effect on secondary prices of Port Authority bonds? A. I don't know how to answer the question. I don't believe that that was discussed at the time because I think that—

> The Court: Based upon your experience trading in these bonds?
>
> The Witness: It might have some effect.
>
> The Court: It might?
>
> The Witness: Sure.

Q. If you look a little bit closer at the beginning of the articles, I don't want to take you through it, by any means. There are some very strong statements in this article. You have one New Jersey Commissioner saying "The Port Authority is dead in the water." T452-16 to 453-23.

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[454] A. I would answer that by referring to the chart, P-94, which would indicate to me that there was a more substantial drop during that period in Indiana's and Kansas than there was in Port Authority's, so obviously it did not have that much effect on the market.

Q. That is your opinion, Mr. Murphy? A. I am looking at the chart here. In the middle of November to the end of the year, it looked like the Indiana's and Kansas' suffered a much more severe drop.

Q. Do you know why they suffered their drop? A. There is a pat answer in our business. There are more sellers than buyers.

Q. Besides that pat answer, do you know why they suffered that drop? A. Besides that?

[455] Q. Yes, do you have any explanation for that drop? A. None, really, that I can think of, no.

Q. Now, if the article did not have that serious an effect, Mr. Murphy, can you tell me why on P-89 for the period of November we see the Port Authority dropping much, much further than the Massachusetts bonds did? That is P-89. T 454-11 to 455-8.

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A. Well, you are taking in a longer prospective there and I think I earlier testified there was substantial selling for Ports bonds in November and December. That is how we got ourselves in the bind on the short positions. T 455-12 to 455-15.

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Excerpts from Testimony of Michael Zarin

[466] [By Mr. Landis] Q. Mr. Zarin, I understand you are employed [467] by the Port Authority, is that correct? A. That's correct.

Q. In what capacity? A. I am Chief of the Finance Division of the Law Department of the Port Authority of New York and New Jersey.

Q. And you are, as I understand it, a member of the Bar? A. I am a member of the Bar of the State of New York.

Q. And you are educated as a lawyer? A. Yes, I am educated as a lawyer.

Q. And with a BA and LLB degree from what? A. I graduated from Dartmouth College with a degree of AB in 1953 and from Columbia Law School I have a JD degree, and graduated in 1956.

Q. How long have you been employed by the Port Authority? A. Since 1956.

Q. And in what capacities? A. I first started as a law assistant and almost immediately became an attorney, upon my admission to the Bar in 1956. And in 1965 I became Chief of what is now known as the Finance Division.

Q. Had you worked in connection with the [468] Finance Division prior to 1965? A. Yes. At that time it was essentially a Finance, Taxation, Insurance and Research Division.

Q. Was there some restructuring at that time? A. In 1965 two divisions were created out of the division that I have just mentioned, an Opinions and Appeals Division, and a Finance Division.

Q. Where were you employed before 1965, in what operation? A. Before 1965 I was a member of essentially the same division.

Q. You have had responsibilities in the area of finances of the Port Authority? A. Yes, I have.

Excerpts from Testimony of Michael Zarin

Q. Over the entire period of your employment? A. That is correct.

Q. And are you involved in any organizations in connection with your work outside the Port Authority? A. Yes. I have noted down the outside associations that I think has some bearing on these financial matters. Those include, I am a member of the Standing Committee on Debt Administration of the Municipal [469] Finance Officers Association of the United States and Canada. I am a member of the American Bar Association Local Government Law Section and its committee on liaison with the Securities Industries Association. I am a member of the Municipal Forum of New York. I am Chairman of the Law Committee of the International Bridge, Tunnel and Turnpike Association.

Q. Have you had any post law school education? A. I participated in and completed the Harvard Business School Advance Management Program in 1972. T 466-25 to 469-11.

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Q. Mr. Zarin, you are familiar with the subject matter of this litigation, are you not? [470] A. Yes, I am.

Q. Of course, as we previously established you are familiar with the circumstances under which you are called as a witness. Would you then please explain to the Court as you understand it, the meaning of the 1962 covenant and the relationship of the covenant to the other security provided by statute and contract to the consolidated bondholders of the Port Authority.

The Witness: Your Honor, before I do that, may I make clear something about my position here today?

The Court: Yes.

The Witness: And that really has a relationship to my position as an attorney for the Port Authority of New York and New Jersey. In that structure I make recommendations to the general counsel of the Port Authority, and he in turn recommends those things which he wishes to the Executive Director and to the Board of Commissioners.

So that not only in my discussion here today, but in practice as far as the Law Department of the Port Authority is concerned, my opinions and the statements are not binding [471] upon the Port Authority even in my work until general counsel has approved them.

And I just want to make clear, as I understand it, the Port Authority is not participating in the particular litigation between the United States Trust Company and the two States, and my appearance today is as a witness in that proceeding.

The Court: You are expressing your own opinions, really.

The Witness: Fine, thank you very much. I might say, of course, that the opinions even that general counsel expresses and gives to the Commissioners, the Commissioners themselves, as you know, being appointed from each State constitute the authority and make those decisions for the Authority subject to gubernatorial veto.

I think since the question is a very broad one I would like to step back just a little bit in time from the time of the covenant to the time when I became aware of the fact that the Port Authority was becoming involved in rail transportation and the efforts to become involved in rail transportation.

[472] The Court: Well, I am not particularly interested. I don't know whether counsel for the—

The Witness: I don't mean—

The Court: U.S. Trust Company may be, but I am not particularly interested in what the Port Authority may have done with respect to rail mass transit. All I am interested in is the structure of the bonds.

The Witness: That's right, and that is really what I—I don't mean to speak factually on that subject, just to make sure that the legal matter is on the table that we are discussing and the background of the legal matter is in order to become involved in this area. We had to so structure our legal and financial relationships to enable us to do so.

At first, it appears to be extremely difficult to get the deficit operation of any kind because the Port Authority initially was set up as a self-supporting agency, and as a bi-state agency, was one part of its structure.

[473] The other key part of its structure was the self-support structure, so when we were being called upon by the two states to go into passenger rail transportation, being a deficit area, we had to look at the structure again.

At first, we, all of the people who were looking at it, there was no way that we found initially. The first way that we found and developed was in connection with what is now the New York State commuter car railroad program, to which the two states passed legislation enabling each state to pick up the option of guaranteeing the commuter railroad car bonds which would be issued by the Port Authority

essentially as an agency outside the Port Authority's financial structure.

The Port Authority's experience in issuing bonds, entering its contracts, and building was to be utilized, but not the whole structure which we will talk about in a moment.

New York passed the legislation to that effect, adopted a Constitutional [474] amendment guaranteeing up to 100 million dollars of bonds.

Under that, the Port Authority has purchased and leased to various commuter railroads, including the Long Island Railroad, and what is now the Penn Central system in New York, hundreds of commuter railroad cars and that is a revolving 100 million dollars so that as principal has been paid off over the years, we have actually issued more than a hundred million dollars, but always as a limit of state guarantee.

The bonds are paid via rentals from the commuter railroads and if a rental payment does not come in, the State comes in to pay it. That has never occurred.

After that structure of participation, there was an additional call to the Port Authority to participate in commuter railroad systems and what was developed in order to permit Port Authority participation is the 1962 covenant.

The next step, as I remember the procedure, and I think that that being the next step, perhaps I ought to describe a [475] covenant as I understand it because I think before letting me give the background of how we arrived at that point.

In describing the covenant, I will try always to contrast the covenant or to compare the covenant

with all of the other protections and covenants under the statute and bond resolutions as I understand them.

The 1962 covenant is contained in Section 6 of Chapter 8 of the Laws of New Jersey, 1962, and the concurrent legislation which is Chapter 209 of the Laws of New York State of 1962.

In describing this covenant, your Honor, I think that I should at least initially confine myself to Section 6(b) which has been repealed, if that is agreeable to you.

That covenant is a very exact limitation on the deficit which may be incurred by the Port Authority in connection with passenger railroad facilities, in addition to those of the basic Hudson tube system which the Port Authority commenced operation in the latter part of 1962.

[476] The limitation is in two parts: One part would permit an additional deficit operation if the annual deficits, as measured in the statute, do not exceed ten percent of the General Reserve Fund of the Authority. That ten percent has an alternative computation, and that alternative computation is a computation of equity and amounts invested in facilities which is a one percent calculation, and the one percent calculation is really, as your Honor understands, analogous to ten percent of the General Reserve Fund, and the General Reserve Fund itself, being ten percent of the outstanding debt, ten percent of that amount is one percent.

However, being recognized that the debt of the Port Authority, of course, can be reduced, the General Reserve Fund being reduced, that permitted deficit would narrow. The alternatives would

measure, would be the amount which the Port Authority has invested in facilities which are paid up, so that you would have the ten percent of the General Reserve Fund plus the one percent [477] of the equity, the amount which has been paid, and the amount paid into the facilities by way of investment of Port Authority funds. These amounts are adjusted so that you essentially cannot bootstrap them by putting money into additional railroad facilities, increasing your debt, increasing the ten percent or in essence increasing the equity amounts.

Those are in broad outline the limitations, and I should point out that I believe you have in the record, the official statement in connection with the 41st series of bonds and the statutory covenant and really probably a more exact summary of it than the one I have been able to give you orally, the one which we have set forth on page 16 and 17 which actually appeared in the 39th series, official statement and all the other official statements.

[478] The Court: In order for me to just comprehend the effect of the covenant that gets us back to the General Reserve Fund.

The Witness: Fine. I intend to do that and I'll do that now.

The General Reserve Fund of the Port Authority is a Reserve Fund, Statutory Reserve Fund, set up under the General Reserve Fund Statutes of the Port Authority, which in its practical effect today states that the Port Authority shall maintain in the General Reserve Fund—and when I say shall maintain, that's to the extent that there are funds available to maintain a reserve equal to 10 percent of the outstanding bonded debt of the Authority.

It is really the debt which has been issued for terminal and transportation facilities and World Trade Center, of which that outstanding debt issued in the form of bonds for which the General Reserve Fund stands as a security.

10 percent of—the amounts of 10 percent of those bonds equal the present General Reserve Fund, and that is the fund against which this provision is measured that we have been [479] discussing.

The Court: Now, is there any other Statutory Reserve Funds the Port Authority is required to maintain other than the General Reserve?

The Witness: The General Reserve Fund and other statutes contain provisions under which the Authority may enter into agreements with bondholders, but I take it that those are not the agreements that you are talking about. You are talking about strictly statutory ones.

The Court: Statutory ones.

The Witness: And I don't recall that even the Consolidated Bond Reserve Fund is set up under statutory—under the statutes. I believe that that is set up under the Consolidated Bond Resolution.

So my testimony now would be and, of course, some of these questions that will come up are things that I may want to check, but my understanding is that this is the Statutory Fund, the General Reserve Fund is the Statutory Fund.

The Court: All right. Now, at the time the General Reserve Fund was authorized by legislation it was to consist of 10 percent of [480] the par value of all bonds issued by the Port Authority and currently outstanding. Is that your understanding of the General Reserve Fund?

Excerpts from Testimony of Michael Zarin

The Witness: That the intent—well, your Honor, that is the general understanding of it and I don't mean at all ever to quibble except I think I'm here as the person to give some really technical understanding to the extent I'm able.

People in our organization that frequently recall this requirement in conversation, and I'm always careful to point out when that occurs that it's a requirement only in the sense that it's specified in the statute.

If the General Reserve Fund were to fall below 10 percent that is not an occasion for bondholders, for example, to feel that a covenant has been breached.

The Court: No, I understand that.

The Witness: It's only to the extent that there are funds available that we would maintain it at 10 percent.

The Court: Right. The statute does not require you to have the 10 percent there if [481] you don't have it.

The Witness: You've stated it precisely.

The Court: So that's what the statute required as of 1931, and that applied not only to bonds then currently outstanding, but bonds thereafter issued.

The Witness: Bonds thereafter issued of the types stated there, bonds legal for investment and issued for particular terminal transportation purposes. I don't have the statute before me.

The Court: All right. Now, between 1931—well, before we get to that, the statute also authorizes the Port Authority to pledge the monies in the General Reserve Fund for the repayment of interest on bonds thereafter issued by the Authority. Is that correct?

Excerpts from Testimony of Michael Zarin

The Witness: Yes, your Honor.

The Court: Now, after 1931 the Port Authority did build certain facilities under the terms of what I have described in the papers here as the General Reserve Fund Statute?

The Witness: That is correct. T 469-24 to 481-23.

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[502] The Court: Is there anything which should be inserted in this chronological history before we get to the adoption of the consolidated bond resolution?

The Witness: Your Honor, the explanation and discussion which we have just had effectively demonstrates the closing, in my judgment, of all of those prior liens, so that we may, in essence, in our discussion, take all of the prior obligations of the Port Authority before 1952 and say that they really do not need to form part of our discussion because the liens on those bonds were closed by these trusts and the bonds, themselves, while at one time they were so-called "open end issues," in that more could be sold of them, that ability to sell more of those bonds was closed when the consolidated bonds came into being, so I think we do not need at least for the purposes of this discussion, as I understand it, to consider pre-1952-issued obligations.

The Court: And assuming that the Port Authority never issued a consolidated bond and that this is all that was outstanding and then actually all of the revenues coming in for the [503] operation of your facilities, for the maintenance charges, could be allocated to any purpose consistent with the charter of the Port Authority? In other words, none of

these bonds have any call on any revenues that come in?

The Witness: Those bonds, G & R, Air Terminal, Marine Terminal Bonds, are not presently part of the revenue flow.

The Court: Then you do not make any allocation of revenues to any of them aside from the payment of the operating expenses under the facilities themselves?

The Witness: As far as the obligations themselves are concerned, they are satisfied by payments by the Trust Company.

The Court: Does the Port Authority have any bonds outstanding prior to 1952 that were issued prior to 1952 which have any call on any revenues of the Port Authority at the present time?

The Witness: At the present moment, there is no call on any such revenues. I would say that the trust agreement itself provides that all of this is proper during the maintenance [504] of the trust. If we were not to maintain the trust for some reason and the trust was not to function, then it is conceivable that the revenue flows would still go to those bonds, because I think the agreement talks about upon the establishment then during the maintenance of the trust, we have defeased the liens. T 502-1 to 504-7.

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[510A] The Court: I guess we are ready for 1952, consolidated bond resolution.

Now, in the sequence in which they occur, I am not so sure whether I am exact in this, would you explain first the 1.3 test under the consolidated bond resolu-

tion? First of all, what does the consolidated bond resolution cover in terms of facilities?

The Witness: The consolidated bond resolution—

The Court: At the time it was adopted, what did it over, what did it authorize the Port Authority to do?

The Witness: Well, of course, any [511] resolution—

The Court: At the time it was adopted, what did it cover, what did it authorize the Port Authority to do?

The Witness: Well, of course, any amounts which were to be invested after 1952 through the issuance of the Port Authority obligations beginning with 1952 and extending for quite some period of time thereafter, were consolidated bonds. There were no longer any G & R, air terminal or marine terminal bonds issued, so the consolidated bonds were issued for all the facilities of the Authority from that point on, whether they be bridges and tunnels on which the G & R bonds may have a first lien or air terminal bonds and so forth.

Then the first facility immediately following, in other words, a new facility immediately following on that would have a first lien on consolidated bonds.

The Court: As I understand it from Mr. Goldberg's book, the consolidated bonds could be issued for any purpose whatsoever? T 510A-11 to 511-24.

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[512] The Witness: Yes, your Honor.

The Court: And in fact, historically, you did issue consolidated bonds for improvements to G&R facilities as well as air terminal facilities and marine terminal facilities?

The Witness: Your Honor, perhaps I should say, just so that my statement is clear, that Mr. Goldberg's sentence says, "After unlimited purposes," that is any purposes that the Port of New York Authority was authorized by statute to go forward with and to use the general reserve fund [513] in connection with.

Now, the general reserve fund, so that we cannot issue for anything but those things that we are authorized to.

The Court: Of course. The general reserve fund substantially applies to the consolidated bonds which were issued by the Port Authority?

The Witness: Yes, your Honor.

The Court: Okay. So these he goes on to say are open-end bonds. In other words, you could continue issuing bonds under the terms of this resolution for old facilities and further improvements and so forth.

The Witness: Yes, subject, of course, to the limitations which your Honor alluded to before.

The Court: Yes. Now, in order to issue a consolidated bond, the 1.3 test must have been satisfied, there must be, I assume, a certification that the 1.3 test will be met.

The Witness: The 1.3 test must be met prior to the issuance of a consolidated bond [514] issue.

The Court: Now, would you explain the 1.3 test?

The Witness: Your Honor, the 1.3 test under the consolidated bond resolution is contained in the consolidated bond resolution adopted on October 9, 1952, by the Port Authority of New York and New Jersey. At that time, the Port of New York Authority.

The Court: What page are you on?

The Witness: That resolution appears, beginning of page 55 of the official statement with respect to the 41st series. That is Exhibit 2.

The Court: What page then are you on?

The Witness: The consolidated bond resolution, Section 3, commences on page 57, the condition under which bonds have been issued [is] condition 3 appearing on page 59.

The Court: Condition 3.

Now, there are four conditions, any one of which must be met before you can issue a consolidated bond. Is that correct?

[515] The Witness: Yes.

The Court: Are you saying that the Authority has elected only to issue bonds under condition 3?

The Witness: I am saying, your Honor, that we would issue obligations—that is to say, assuming that there is a project for which Commissioners wish to issue obligations, we would then examine this resolution to determine whether they could be issued and we have found that conditions other than condition 3 are more restrictive and therefore we have used condition 3.

The Court: Have all the bonds been issued under this condition?

The Witness: I believe that that is correct, but I am not absolutely certain. My answer would be yes, within the context of this discussion.

The Court: Then would you explain the requirements of condition 3 which is the 1.3 test?

The Witness: Yes, your Honor, condition 3 is a protection with respect [516] to the issuance of debt by the Authority and it measures, in essence, two mathematical, ascertainable facts. One is what will

the debt service be in the maximum future debt serv ice year on—in this case, really, it is bonds secured by the general reserve fund.

Now, that means that you would take all of—if I may, may we talk in terms of today, of how this would work? We would take all of the obligations, bonded indebtedness, secured by the general reserve fund presently outstanding and determine what is the year in which the maximum debt obligation namely principal and interest is due because the bonds, whether they be serial bonds which come due at a particular time, or sinking fund bonds which require these sinking funds from time to time, term bonds, which have the technical due date, sometime in the future, and I think I have heard that described in court here before.

There are other obligations for payment of principal and interest and you may ascertain as a mathetical matter what year in the [517] future is the largest payment due.

That is a number, whatever it may be.

[518] The Court: All right.

The Witness: And that's throughout the one side of the equation. T 512-13 to 518-3.

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[521] The Court: All right. Now, you have explained then the one part of the equation is the maximum debt service requirement that you can project for the future.

The Witness: That's right. T 521-15 to 521-19.

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[522] Mr. Sovern: Excuse me, your Honor. I'm sorry for interrupting, but as I heard the testimony,

I want to be sure that I am clear about his. On the first part of the equation Mr. Zarin mentioned only the indebtedness already outstanding. Do you plan to come back with a new indebtedness or should that be pumped in at this point?

The Witness: I think that that is a [523] pertinent observation, your Honor, and that the obligations to be issued, also the debt service on those obligations also are to be included in the balance on the maximum future debt service side of the equation.

The Court: So it is plus the debt service requirement on the bonds to be issued.

The Witness: That is correct.

The Court: Okay. Now, does that complete the one side of the equation, of the formula?

[524] The Witness: It includes one side of the equation in the event the usual test with respect to the issuance of consolidated bonds under the 1.3 test is used; and the way we have usually used them is on the basis of the test of historical revenues.

The Court: Now we are on the other side.

The Witness: That is right.

The Court: Isn't that this formula?

The Witness: In this formula we have—

The Court: The revenues for your best twelve months out of the preceding thirty-six months—is that right?

The Witness: That is correct.

The Court: —must be equal to at least 1.3 times the maximum debt service requirements that you can project into the future. Is that it?

The Witness: That is the statement of the general rule under which we have been operating.

Excerpts from Testimony of Michael Zarin

The Court: Now, these revenues, do they include all revenues?

The Witness: The net revenues.

[525] The Court: Net revenues.

The Witness: Yes.

The Court: And that is from all facilities?

The Witness: That is from all current facilities of the Port Authority.

The Court: Does anybody have any questions on the 1.3 test? Or is there more to it?

The Witness: I think your Honor fairly stated it; there is more to the 1.3 test then we have just analyzed.

The Court: All right.

The Witness: There is more to the 1.3 test on the technical side, and there is, of course, a great deal more in terms of protections which it furnishes which we of course have not yet gone into. But in terms of the technical side of it, which I think your Honor is addressing at the moment—

The Court: That is right.

The Witness: —the 1.3 test also permits of certain estimates to be made under which the historical revenues which you have discussed may be augmented up to an amount equal [526] to 25 percent of the revenues which your Honor stated, that is the historical revenues, namely, the twelve months out of the next preceding thirty-six months, twelve consecutive months.

The Court: Up to 25 percent.

The Witness: That may be done in the event that there is a projection that the revenues to be derived from certain facilities for which the bonds are issued will actually be realized.

Excerpts from Testimony of Michael Zarin

The Court: Yes. You have to have a projection.

The Witness: That is right.

The Court: And if you have such a projection what you are saying is that you can include in the revenue part up to 25 percent of the projected net revenues.

The Witness: That is right. So that when you do that, as I was tossing this around in my mind thinking about it, if you are using historical revenues to the maximum, it is close to but not quite a one-times coverage test.

If you are using only historical revenues it is a 1.3 times test, because if you [527] use all of the historical revenues plus the 25, you are saying you are at 125 percent as against the 1.3 situation.

The Court: Right.

The Witness: And there is a thin margin over what we would call a one-times coverage in that situation. However, if you do include estimates you may also have to include on the original side of the equation additional bonds which are necessary to be issued in order to achieve those revenues. T 522-17 to 527-11.

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[528] The Court: If you ever use the project to augment your income then you would have to use the debt service requirements of the bonds that you will have to issue to achieve those revenues for the next three years. Is that right?

The Witness: That in essence is it. How the technical method would go and precisely which bonds they are is something we would have to analyze very closely. We have not done this really to any great

extent as far as that is concerned. Although we may have to.

The Court: Is there anything else about the 1.3 test we should know?

The Witness: Your Honor, if I may say so, that is the kind of question to which your [529] Honor subjected me when you asked me to appear to consider this matter independently with the respective counsel, almost word for word. I will answer your question.

The Court: No; in the context of this case, you know what the issues are.

The Witness: I understand.

The Court: Is there anything else that is important for us to know in the requirement of meeting the 1.3 test? Because up to this point I have a certain question which occurs to me, and maybe that will show you what I mean.

The Witness: Well, your Honor, we have addressed the technical provisions of the 1.3 test. The questions which I have addressed myself to have to do with what protection the 1.3 test affords.

The Court: Right.

The Witness: I will be glad to—how do I understand your question? How am I to understand your question?

The Court: Let me ask you a specific question and see if that sheds any light on what I really want to know.

Supposing the Authority wanted to issue [530] consolidated bonds in X amount to purchase a mass transit facility, and they projected a deficit for the foreseeable future with respect to that facility. How would you utilize that deficit in the 1.3 test?

The Witness: Your Honor, in my judgment the 1.3 test would in most cases not take cognizance of the deficit, because the 1.3 test is a protection against, in the context in which we have discussed it, general reserve fund bond maximum future years debt service.

So that certainly the particular obligation which was issued in order to commence an additional rapid transit operation, let's say of the type we are now working on in both the states of New York and New Jersey, the bonds to be issued at that time for that particular facility would be included as far as the maximum future years debt service is concerned. But the operating deficits and future issuance of debt for future capital expenditures in connection with that facility would not then be there. So it would just furnish as far as I understand it the limited protection with regard to the capital expenditures for which the [531] bonds are then being issued.

The Court: That is precisely what I am trying to find out: whether the 1.3 test furnishes any protection against the assumption of a huge operating deficit situation. And suppose you only had to issue $10 million in bonds, let's say, to acquire the Erie Railroad—I don't know whether the Erie is in bankruptcy or not, but let's make that assumption—or to acquire all of the commuter railroads that are operating in North Jersey; so your debt serivce requirements in this formula would not be particularly increased. But the operating deficit was $100 million a year.

Are you saying that you could nevertheless apply the 1.3 test using your historical earnings? And you

have no projected earnings to augment it; it is going to be a deficit. You apply the 1.3 test using your historical earnings to the bonded debt.

[532] The Witness: First of all, in answer to your question, I understand your question to be isolating it to the 1.3 test.

The Court: That is right.

The Witness: And recognizing that if 1962 will be applied to it, it would be one kind of thing, and all the other protections—

The Court: We are sticking in 1952.

The Witness: That's right.

The Court: Now we've got the consolidated bond resolution, and we don't have the covenant. All I want to know is whether the 1.3 test would preclude the Authority's assumption of a deficit operation.

The Witness: Your Honor, that would depend on the type of deficit operation concerned, how the Authority was going to assume the deficit operation, and the precise methods of doing it.

The Court: Well, take my hypothetical.

The Witness: Yes. If I were to answer your hypothetical question, it would be in answer—and I will answer it—to one method by which such a proposition might be presented. If I understand the particular [533] proposition which you were presenting, it is that you were undertaking the totality of a rapid transit system which has $100 million of deficits in a prior year.

The Court: Forget about that. Let's assume that the Authority is going to build rapid transit facilities throughout the meadowlands, and let's say Newark, et cetera; they are not going to acquire it from somebody else.

The Witness: What your Honor is describing now is akin to the connections of the Erie and Lackawanna and so on that are presently under contemplation and an extension of the PATH systems say down to Plainfield and that kind of thing which we are thinking about now.

The Court: Let's take it in two different phases. One is that they build a totally new facility.

The Witness: Right. Okay.

The Court: So it has no historical operating deficit as such.

The Witness: All right.

The Court: So you are going to build [534] that facility, and let's say it would cost you $10 million to build it, whatever it may be.

The Witness: Yes.

The Court: It may be a very small facility, but nevertheless it is a commuter transit facility, and you build it; you need to issue $10 million in bonds; and you can project—let's say you have $50 million in operating deficit each year.

The Witness: The 1.3 test, as I understand it, furnishes no protection in that situation.

The Court: That is what I want to know. You do not have to throw the $50 million operating loss into the equation when you are computing 1.3.

The Witness: That is my understanding.

The Court: Now let's assume that instead of building it they acquired the trackage for $10 million and that those railroads which were operating the trackage had a $50 million loss each year.

The Witness: Your Honor, if you were acquiring just the trackage—

The Court: —and the passenger cars, [535] similar to what was done with H & M.

The Witness: In the case of H & M, then we were acquiring an entire system.

The Court: Right.

The Witness: And in that situation, your Honor is saying that we would be operating the entire system as well, I take it.

The Court: Yes.

The Witness: Well, in that situation, which I am not sure that we have ever addressed before, that is an area—I am trying to define these areas where I have actual experience from those in which you are discussing in the situation.

The Court: Yes.

The Witness: And I am not sure that that situation even existed with respect to the H & M, namely, that it was operating at a deficit prior to the takeover.

The Court: Sure it was, wasn't it?

The Witness: No, I am not sure about that.

The Court: It was in bankruptcy.

The Witness: It was in bankruptcy, not able to meet its obligations. It was an [536] operation that consisted not only of the railroad operation but a number of other operations, also. And what was happening there—

The Court: Let's not go into detail with respect to it. Let's just stick with the hypothetical.

The Witness: In the hypothetical situation we would have to address the Condition 3, small Roman i, that in the case of facilities which have been in operation during the entire period of thirty-six months next preceding such time of issuance, we

would have to look at the combined net revenues derived from all such facilities.

There is an initial question which I would have to address if I were to examine this in an actual situation, whether the words "derived from" in that situation included a deficit or not.

If I did determine that it did include a deficit, which it may very well—as I say, that is something I really would have to consider, if it included a deficit in that particular small Roman i section, then obviously [537] we would be including those in that projection, if I came to that conclusion and so recommended and counsel for the Authority and others coincided with that judgment.

We are talking now in the case of the takeover of a complete facility operating at a deficit in the preceding thirty-six months.

The Court: Now you are not prepared or could not at this time express an opinion on that?

The Witness: Well, I think that, as I say, these are things I have been thinking about over the past few days and so on.

The Court: Yes.

The Witness: I think that if you are going to take over a whole operation, which is one of the possibilities, with that kind of a deficit you might very well have to include the deficits in that particular situation.

[538] The Court: Okay. Suppose you took over less than the whole operation?

The Witness: Your Honor, that goes to another type of question, which I am not addressing myself to, but which I have considered. T 528-10 to 538-6.

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Excerpts from Testimony of Michael Zarin

[540] The Court: All I want to know is, in your opinion, is the Authority required to include the deficit in its calculation to determine whether the 1.3 test has been satisfied?

The Witness: If we're talking about the deficits on an existing operation, which has existed in the past 36 months that's really the same question which we addressed ourselves to before.

The Court: You said if they took over the whole operation, in your opinion, they would have to include it. Now, we are [541] taking less than the whole operation.

The Witness: If they took over parts of the operation, which were deficit producing at that moment in time then—and having passed under the assumptions, the hurdle that we would include it in the deficits in the subdivision 1 the answer to that question would be yes. T 540-13 to 541-8.

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[543] [By Mr. Landis] Q. Mr. Zarin, does the 1.3 test really protect against deficit railroad financing by the Port Authority?

The Witness: Your Honor, the 1.3 test may be protective in certain very limited cases, but as I have examined it, I do not believe that it is protective against operating deficits. It is not protective in the situation in which your Honor outlined initially, namely the assumption of operation of a new facility and if I take protection to mean what I have listened to in the courtroom, what has been addressed to, namely protection of the security of bondholders, therefore it would not be protective in that situation and it would not be protective in my judgment in the event of the takeover an existing facility, if one

Excerpts from Testimony of Michael Zarin

were to approach that facility with the objective of bringing that facility within what we would call the general reserve fund family.

If you were to take it in particular ways, once you had taken it in even a limited [544] manner, there are some very real additional problems because the method of building a facility is not only a method through the use of the issuance of consolidated bonds. I really have—I think I have a few specific things in mind.

One would be the method of bringing in such a facility. I think, your Honor is correct in both assumptions which you addessed before the recess, namely if you were to assume an entire deficit operation at one time—as I say, I have never addressed this practically. If I had to address it, I think that fairly read you would probably have to include the prior deficits.

I could conceive a situation in which I would be pushed fairly hard on that question of if the Port Authority were directed to take something over because I would then be asked whether those were derived from, really mean only pluses, because in other cases, they do mean only pluses in this and other documents, but I think I would probably take the position in that situation that you would have to include [545] the prior deficits, and likewise in the situation which would be undertaking part of a facility which is operating at a deficit, but in thinking about the situation, I can see a possibility of taking on parts of an operation which were not deficit-producing as part of the Port Authority's obligations, and then taking on additional portions which

were deficit operations. If you did that, even if those deficits were to in a subsequent year prevent you from issuing any consolidated bonds, there are still sources of funds available to the Port Authority which could and probably would be used for the development of that facility and the payment of its deficits, funds which now stand as security for the bondholders.

Q. You are getting into then the flow of funds under the consolidated bond resolution, aren't you?

The Witness: When we —once we have issued an obligation for a facility, then all of the convenants and the flows of funds apply to that facility.

The Court: I realize that, yes.

[546] The Witness: Now, so that part of it does have to do with the flow of funds.

That part that I am talking about has to do with, for example, and it is a dramatic example, is the one that occurs to me, is that if you wanted to assume —you being the Commissioners of the Port Authority—wanted to assume the development and operation of, say, the Second Avenue subway which is not yet in operation, there being no deficits, operating deficits on that facility, and say the prior bonds being the obligation of the Transit Authority or the City of New York, you could, absent all other protections which exist, which we are not talking about, probably undertake that portion of that kind of deficit operation.

Having undertaken that portion of the deficit operation of the subway system, we are bypassing right now, whether other covenants, which we will get into,

Section 7 and Section 6 of the statute, might protect against that, but having taken that as part of the general reserve fund family under the 1.3 test which we are addressing now, the [547] hypothetical situation in which—which you have addressed in the past days and which we have addressed from time to time at the Port Authority in thinking about what are the perimeters of this thing, the rest of the system, there being now a facility on the Port Authority's books dealing with the rail situation, there is nothing under the 1.3 test which would prevent the balance of that system from being given to the Authority without the issuance of any obligations, thus incurring even a more—well, and obviously a type of deficit that would be more substantial.

In my judgment, for that reason and for a number of other reasons, if we are talking in terms of what the protective perimeters are of the statute so far as someone working with it, with an objective to bring into it, and let's even put the New York City subway to the side for a moment, if you have an objection to bring into the family substantial deficit operations, it is not the 1.3 test which furnishes the protection, whether with respect to railroads or with [548] respect to facilities of any other type.

The 1.3 test, if I were to ask a lawyer in my division to bring—to somehow bring within the family such a facility without looking at anything but the 1.3 test, I would feel that he was not being appropriately creative if he could not figure out some way to do so. T 543-2 to 548-9.

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Excerpts from Testimony of Michael Zarin

The Court: Well, now, in that connection, the legality of the issue of the bonds under the consolidated bond resolution, which is the only time the 1.3 test comes into play when you go to issue a bond—

The Witness: The 1.3 test comes into play at the time of issuance.

The Court: The legality then of the issuance of the bonds is passed upon not only by Mr. Falvey, the general counsel of the Authority, but also by bond counsel.

The Witness: Yes, sir.

The Court: So that you not only have to think of some ingenious way of circumventing the intent and purpose of 1.3 that satisfies Mr. Falvey, but you have to satisfy somebody [549] else.

The Witness: That's correct, your Honor, and as far as the 1.3 test is concerned, I would not deem that to be a difficult job. T 548-11 to 549-5.

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[551] [By Mr. Sovern] Q. Let's take the hypothetical you gave of the Second Avenue Subway in which first the Port Authority, through the issuance of consolidated bonds acquires some non-deficit producing—well, it would [552] have no deficit because it has no operations, and then becomes the proprietor of the entire subway system. You said 1.3 test provides no protection against that. I understood that very literally, that is to say it provides no protection against that in the sense that by itself at that moment it provides no protection. But if that event were to occur and at any time thereafter the Port Authority sought to sell consolidated bonds to finish the World Trade Center or improve LaGuardia Airport or put new toll booths on the Washington Bridge would the 1.3 test apply

Excerpts from Testimony of Michael Zarin

to that issue of bonds? A. Somehow, Mr. Sovern, we would find a way to build those toll booths, but apart from that I think your statement is quite correct. When you—

> The Witness: And that's one of the reasons, your Honor, that the 1.3 test has a little bit of unreality to us, because the—if we can't meet 1.3 with respect to the issuance of consolidated bonds our operations, as far as their financing to consolidated bonds are at a standstill.
>
> So really just to meet the 1.3 is not, is not—is skating very close to the point of stagnation for the organization, • • •. T 551-22 to 552-24.

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[556] Q. All right. Let me ask just a couple of other questions. I take it that the point at which Mr. Falvey came to you and said, "Tell me, Mike, whether we can do the Second Avenue Subway and the New York City Transit System this way", you would say, "We can do it, but that's the end", is that correct? A. Oh, absolutely not. I would certainly not say that at all.

Q. You would not say that? A. I would not say that in that manner at all, nor would he address it in that way. T 556-1 to 556-12.

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[557] Q. (Continuing) If we bring into the general reserve family a facility with a 300 million operating deficit, that deficit will have to be calculated in the next time we come to issue bonds and apply the 1.3 test. Is that correct? You would so advise him. A. Mr. Sovern, that's not the way I give advice. And if you want to address the question with respect to the various hypotheticals we're giving here, that's one thing, but I—to answer that question, I would have to go into areas which are—the first thing I

would talk about would be, [558] for example, basic covenants and Section 7 and whether it's a good idea and lots of other kinds of things, but that's not what you are addressing.

> The Court: All we want though, Mr. Zarin, is your opinion, not how you would advise a client who is pushing you, but your opinion as to the interpretation and effect of the consolidated bond resolution on these various hypotheticals. T 557-14 to 558-9.

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[559] [By Mr. Sovern] Q. When you said that the 1.3 test provides no protection in this situation, there they are referring to the building of a new facility or a sort of acquisition of their Second Avenue subway which you hypothesized, when you said the 1.3 protection—I'm sorry, the 1.3 test provides no protection in this situation you are looking at that very limited moment in time without reference to future actions of the Authority in answering the—you were being very literal. Is that correct? A. I was answering in two respects. One in point—in that point of time; secondly, with regard to the limited period of, call it the next three years, which we could analyze out.

And now your question takes me to the point beyond that and saying, "What protection would the 1.3 test then provide?"

And what would happen in that situation is that if there were another occasion to issue consolidated bonds and the maximum future years debt service was exceeded—I beg your pardon—and the maximum future years debt service was—

Q. Off the record, you have to turn [560] that sentence around. A. All right. If the net revenues of the Authority as we have discussed them including such estimates as we might bring into that situation did not equal or exceed 1.3

times the maximum future year's debt service, at that point the Authority could not issue a consolidated bond.

Now, that does not mean, however—your Honor, this does get slightly out of 1.3, but I think you are talking about whether 1.3 is protective of the securities. That does not mean, however, that the security of the bondholders is protected because you have brought this deficit operation into the family of facilities.

Being a member of the family it must be nourished. And the general reserve fund and the consolidated bond reserve fund would then nourish that new member of the family, because they are required to.

If the deficit was as large as you postulated it to be the general reserve fund and the consolidated bond reserve fund would be—

Q. Last about six months? A. It would last a very short time.

Now, that's not only to speak of the deficits [561] because if we did undertake that kind of operation we have an obligation under the miscellaneous covenants in Section 12 to complete that facility.

> The Court: Mr. Goldberg, I think, said that perhaps, if you get the disease in your system you may die.
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> The Witness: Judge Gelman, I'm really sorry in a way that that remark is on the record, because I've devoted considerable part of my professional career to trying to help in bringing into the Port Authority, in a method which would be satisfying to both the bondholders and to the public need for transportation, mass transportation. And I certainly do not consider it to be a disease at all. T 559-2 to 561-16

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Excerpts from Testimony of Michael Zarin

[562] By Mr. Sovern:

Q. To come back to your sequence of events then, this massive deficit is in the general reserve fund family of facilities. It prevents the Port Authority from issuing any further consolidated bonds, because the 1.3 test cannot be met. The consolidated bond reserve, the general reserve fund are then totally absorbed by the deficits. Then what happens? A. Well, then we can't pay the bondholders. And the first bondholders whom we cannot pay—in that situation which is again, we are addressing only the 1.3 test protection, we are not addressing the protections of the 1962 covenant, and so on. And I make that statement very clearly, your Honor, because of the next statement that I am going to say, which is that I am not saying this protection does not—is not currently protected in other ways.

The protection may very well exist in other ways, but under this hypothesis which is presently theoretical, sixteen major banks in the New York Metropolitan area would have no source of payment for over 200 million in bank loans. T 562-2 to 562-25

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[563] Q. All right. I don't want to get us into that byway, but what I do want to conclude on this line of inquiry is I take it that if there were propositions put before the Commissioners by anyone, and anybody who was disposed to take it seriously, you would, and I don't now propose to stipulate the form in which you would give it or [564] what else you would say, you would advise your superiors that they might have before them this probable series of events, as a consequence of the proposed action. Is that correct? A. If we were going to take the actions precisely along the lines that we have hypothesized, and with the

Excerpts from Testimony of Michael Zarin

particular deficits that we have hypothesized, and so forth, I would so advise. T 563-20 to 564-8

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[567] Q. May I ask, you described the 1.3 test as mathematical and precise when dealing with both the calculation of the maximum debt service and the historical revenues. Then you went into a discussion of the possible inclusion of estimates of up to 25 percent more of additional revenues from the facilities that were not operational at the time of the issue. How were those estimates made? Are they made with great care? A. Mr. Sovern, I do not make those estimates. I believe them to be made with care.

The Court: It is the professional staff of the Authority which makes the estimates.

The Witness: Yes, that is right, your Honor.

Q. And outside consultants are consulted as well? A. To make those estimates?

Q. Yes. A. I would say that would not usually be the case.

Q. But it is the professional staff of the [568] Authority that does that estimating? A. That is correct. T 567-4 to 568-2.

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[By Mr. Landis] Q. In response to Mr. Sovern's question about the 1.3 test you indicated the need to nourish a facility in the consolidated bond family. Would you be specific about the source of that requirement and describe it in more detail?

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[569] The Witness: We are not talking about flow from the general reserve fund or anything of that sort, but just on Page 67 of the official state-

ment that we are talking about, there is a Section 12 called "Miscellaneous Covenants." I was referring to Paragraphs [c], [d] and [e] which reads as follows. The introduction I should say to all of these is:

"The Authority covenants and agrees with the holders of Consolidated Bonds, and with each such holder, as follows." And then skipping [a], talking about performing all duties required by the Constitutions and so forth and others, to [c]. [c] reads:

"To proceed promptly and in an economical [570] and efficient manner with the effectuation, establishment, acquisition, construction, rehabilitation or improvement of all facilities, the effectuation, establishment, acquisition, construction, rehabilitation or improvement whereof is financed with Consolidated Bonds."

Mr. Landis: Or if you could not finance it with Consolidated Bonds.

The Witness: That is what I was addressing, if you could not do that you would have to look—it is a covenant, to proceed. So you would look to see whether you had any other source of funds.

Once having financed a portion of the facility with Consolidated Bonds, and covenanting to proceed promptly with the effectuation of the facility which is financed with Consolidated Bonds, we would look to another source, or could continue.

But I am also referring to Subsection [d] which says:

"To maintain in good condition all facilities the surplus revenues of which are payable into the General Reserve Fund, and to operate them in an

efficient and economical [571] manner, making all such renewals and replacements and acquiring and using all such equipment as the Authority shall determine to be necessary or desirable for the proper and economical maintenance and operation thereof."

And [e]:

"To make such improvements as part of or in connection with facilities the surplus revenues of which are payable into the General Reserve Fund as the Authority shall determine to be necessary or desirable as incidental to or in connection with the operation of said facilities."

I perhaps should not have used so imprecise a word as nourish, but I think that perhaps is descriptive when considered along with another term which I used, namely, bring the facility into the family. T 569-11 to 571-18.

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[573] The Court: I would like you to describe the flow of funds under the consolidated bond resolution prior to the enactment of the covenant.

The Witness: When your Honor speaks of covenant—

The Court: Or as it would occur without the covenant—as it would occur today without the covenant.

The Witness: When your Honor speaks of covenant, I take it you are speaking of section 6 of the 1962 legislation.

The Court: That is right, exactly. And let's take it as of today, assuming that there is no covenant that is in effect.

The Witness: The flow of funds with respect to the consolidated bond resolution is the same as the

flow of funds which I have described with respect to the general and refunding, Air Terminal and Marine Terminal Bonds, with the—

The Court: Let's see if I understand it. You collect all of the revenues from all of the facilities of the Authority. Is that right?

The Witness: Yes.

[574] Mr. Sovern: If I may, your Honor, for which consolidated bonds have been issued. Is that not correct?

The Witness: The flow is the same. Mr. Sovern is correct with respect to the facilities, and as your Honor well knows, the Air Terminal Bonds, or the Revenues were flowing from the particular facilities and the others from those faciilties, and so on.

The Court: But not any more.

The Witness: Now, when I said the same, I meant all of those facilities and any facilities constructed since then, because having placed to one side the prior lien bonds then all the facilities are within the consolidated bonds family.

The Court: I am looking at the Pledge of Revenues under section 4.

The Witness: Right.

The Court: You have pledged the revenues from each of the following, and you list all the facilities. Are there any facilities owned and operated by the Port Authority other than those described in subparagraph i?

Mr. Laulicht: Either under i or under ii?

[575] The Court: I understand.

Mr. Laulicht: Because PATH and World Trade Center would come under ii.

The Witness: It isn't only PATH and World Trade Center, it is also the new passenger ship terminal.

The Court: So it is all facilities presently owned and operated by the Authority.

The Witness: It is all facilities, your Honor.

The Court: You take the net revenues from those facilities.

The Witness: That is correct.

The Court: Now, PATH is presently operating at a deficit, is that right?

The Witness: Yes.

The Court: And I assume that the World Trade Center is operating at a deficit, is that right?

The Witness: I am not sure that that is the case, your Honor. I don't believe that the World Trade Center is operating at a deficit.

Mr. Landis: Your Honor, I believe that is in the stipulation, and I believe for the year 1973 as stipulated, the stipulation is [576] that there were net operating revenues from the World Trade Center.

The Court: That there were, okay. Then forget about the World Trade Center.

Now, when you start moving the funds around, do you shift funds over to PATH first before you calculate your net revenues?

The Witness: Your Honor, we are at another one of those questions to which I have not been asked—

The Court: Just express an opinion as to how it is supposed to be done.

The Witness: These net revenues as far as these particular facilities are concerned, whether you treat them as being satisfied before net revenues or after net revenues, the year end results for the Port

Excerpts from Testimony of Michael Zarin

Authority, that is to say, what its results from operations are, what the status of its reserve funds are, and so forth, are exactly the same whether you have in fact satisfied the deficit, say, move the money before or whether you move the money afterwards, the result is precisely the same result.

The Court: All right. Then the net revenues are applied to debt service on the [577] consolidated bonds.

The Witness: Yes. Your Honor is putting it in the framework of what it is we do today, is that right?

The Court: What do you do today?

The Witness: We do that, and let's say that today just for the sake of setting the framework is December 31 of any given year, because that is a day on which we can best describe this, within that time.

The Court: All right. You pay the debt service on the consolidated bonds.

The Witness: The debt service on the consolidated bonds would be paid.

The Court: Now, what do you do with what is left over? T 573-1 to 577-16.

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[578] The Witness: It goes to the general reserve fund within that context.

The Court: Up to the 10 percent figure, is that right?

The Witness: That is correct. Actually, if in a particular year the reserve fund were full then nothing goes to it.

The Court: Sure. Then it goes into the consolidated bond special reserve fund or—

Excerpts from Testimony of Michael Zarin

The Witness: Called the consolidated bond reserve fund.

The Court: Now, as I understand it, there is no limit on the consolidated bond reserve fund. In other words, it does not have to be maintained at any specified level. It is whatever is left. Is that right?

The Witness: That is correct, your Honor.

The Court: Now what are the charges on the consolidated bond reserve fund? That is, what is it pledged to?

The Witness: Your Honor, the consolidated bond reserve fund is treated at Section 7 of the consolidated bond resolution appearing on Page 64 of the official statement with respect to the [579] 41st series of consolidated bonds. I think your Honor referred to that as Exhibit II.

The Court: That is Exhibit II annexed to the the stipulation.

The Witness: Yes.

The Court: Now, would you explain that and particularly what may be paid out of the consolidated bonds reserve fund?

The Witness: Yes, your Honor. The section begins by describing the funds and the payments into the fund; that is what we have already discussed.

The Court: That is right.

The Witness: And then the purposes to which the fund may be applied are listed. The first is the payment of consolidated bonds at maturity under certain conditions. So I take it that your Honor wants a brief description, and that has to do with the payment of bonds.

The Court: That is right.

The Witness: (b) has to do with the payment of debt service on consolidated bonds.

(c) has to do with the purchase for retirement of consolidated bonds.

(d) has to do with the redemption of [580] consolidated bonds. I will read (e) if you would like.

The Court: No, it is not necessary. Here is where you can pay expenses.

The Witness: I just meant that this was more than those rather than formal and obvious ones.

The Court: That is right. Here you can pay expenses for the operation of any facility where the net revenues of the facility so long as they were pledged as security for consolidated bonds, to the extent that the gross operating revenues of that facility are insufficient.

The Witness: Yes, your Honor.

The Court: Here is where deficit operation would be subsidized by consolidated bonds.

The Witness: Consolidated bond reserve funds.

The Court: By consolidated bond reserve funds.

The Witness: That is right.

The Court: So accountingwise when we are talking about whether you go up and then come [581] back down to the deficit operation; actually, the way it is literally applied, even though the result may be the same, you are supposed to take the net revenue from each facility and flow it through into the reserve fund and then pass it back to the deficit facility. Is that correct?

The Witness: Your Honor, I am not sure that that is correct.

The Court: All right. Now, [f] is what, the payment of debt service on bonds other than consolidated bonds? We are on [f] now on Page 65.

The Witness: Yes. [f] says: For the payment of debt service on bonds other than consolidated bonds which are described in the last paragraph of this Section 7. And that one states that the pledge made is subject to the rights of the Authority to issue bonds other than consolidated bonds secured by a pledge of or lien or charge upon the consolidated bond reserve fund prior to equal to the pledge, lien and charge in favor of consolidated bonds, only if those bonds are issued to fulfill obligations undertaken for the benefit of the holders of consolidated bonds and if they are also secured by a pledge of the general reserve fund.

[582] The Court: All right. Now, supposing the Authority issues a different class of bonds other than consolidated bonds, you say mass transit bonds, and you incurred this deficit, could the Authority use monies in the consolidated bond reserve fund to pay that deficit?

The Witness: Your Honor, without the protection of any other covenant, statutory or under the bond indenture, but just looking at this section, we are not even going to other parts of this resolution, but just under this particular section and not going to any other statutory material at all, this particular section might permit that kind of a bond, that is again an issue that I would want to sit down and consider carefully which we have not had, but I think that we have not had such a bond, but I think that under this particular section, you could so construct such a bond.

The Court: Which paragraph, F or G?

Excerpts from Testimony of Michael Zarin

The Witness: Well, more certainly under—more certainly under G than F, but under F probably with respect to, say, you were talking—you were talking about a railroad, [583] if I understand you correctly.

Under F, probably with respect to PATH, which is a general reserve fund facility.

The Court: Well, PATH bonds are consolidated bonds, aren't they?

The Witness: Your Honor, I believe asked me whether we could issue an additional type of bond.

The Court: I see what you mean, it would be for the benefit of the holders of consolidated bonds?

The Witness: Yes, sir.

The Court: Now, going back to section four, maybe this obviates the question, but the question I was going to ask was assuming that the Authority never issued a bond for the purpose of engaging in a mass transit operation, but acquired the facilities by way of gift of otherwise, would the Authority be able to use the net revenues annually or funds in the consolidated bond reserve fund to pay deficits in that facility.

The Witness: That is a question which we have addressed, thought about some, and if I understand that correctly, I have to know whether [584] you want me to answer only within the perimeters of section 7 of the consolidated—if I may, your Honor, we are about to embark on some wholesale confusion with section numbers—I am speaking now—

The Court: Let's take section 4, first.

Mr. Sovern: I wonder if the witness could first state his conclusions and then give us the answer.

The Court: Why don't you give us an answer to the question.

Excerpts from Testimony of Michael Zarin

The Witness: I will, your Honor.

The Court: Yes, no or maybe.

The Witness: If we were talking about the section 7 of the consolidated bond resolution adopted in 1952, subparagraph G provides that.

The Court: Can you answer the question yes or no, first, and then explain why.

The Witness: In my opinion, deficits could, if confined just to the section, be satisfied out of the consolidated bond reserve fund. T 578-1 to 584-22.

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[593] The Court: All right.

Now, if you look at page 22 of Mr. Goldberg's remarks.

The Witness: Yes, sir.

The Court: Beginning with the first full paragraph on that page, the second sentence of that paragraph, he says, "All the revenues were pledged to particular families of bonds; all of them had to be used either to pay —", and so forth.

And the next paragraph he says, "You could not make the claim that reserve fund expenditures would maintain or enhance the security of our bonds if the money was to go outside of the P.A. families, as was proposed in one suggestion that we simply subsidize the private railroads to the extent of their commuter operating deficits."

[594] Now, is his position as it is stated here inconsistent with what you have—with the opinion you have just expressed?

The Witness: No, your Honor.

The Court: Well, could you explain how you reconcile what you said or what you have just testified to and what he says here?

First of all, do I understand you are still talking only about the consolidated bond resolution of 1952?

[595] The Witness: Your Honor, Mr. Sovern stated before you commenced this line of questioning that the next step that we would undoubtedly be considering is Section 7 of what it is that we call the series resolution.

By that I have reference to the resolution contained in the official statement which we have been considering at Page 72, entitled "Resolution Establishing 41st Series of Consolidated Bond Resolution, Due 2008, Section 7."

The Court: Section 7 certification?

The Witness: That is correct, Section 7 appears on Page 76 of that statement.

The Court: But if you follow Mr. Goldberg's remarks on Page 22, he is talking about the situation as it was prior to the adoption of the Section 7 certification in which he says commenced with the 12th series of consolidated bonds.

The Witness: Mr. Goldberg goes on, your Honor, immediately thereafter to speak of a fear in the financial community and I think that Mr. Goldberg is speaking, as well, with the benefit of Section 7 of the consolidated [596] bond series resolution in mind.

The Court: Well, that is not the way I read his report.

Mr. Sovern: I think I can clarify it. Mr. Goldberg is referring to the decision, 1958, of the Section 7 certification. That is to be found in Paragraph 2 of Page 76.

I assume that I would ask the witness to correct me if I am wrong, that the first paragraph of Section 7 has been there for some time. Am I correct?

The Witness: Mr. Sovern, I had been sitting here thinking about how I was going to ask you if you had a copy of the consolidated bond official statement with regard to the 11th series of bonds. May I see that, if you have it?

Mr. Sovern: I am afraid I do not, that is why I was stating an assumption rather than a fact.

The key point, your Honor, is that there are two protections in Section 7 that we are talking about, in the series resolution.

The Court: All right.

So, now, let's move from the '52 [597] resolution to the series resolutions.

The Witness: The ones which I previously identified, and also this resolution, Section 7, that I have spoken about in the series resolutions, is, as I understand it, consistent in issues of Port Authority obligations, consolidated bonds and notes, from the 12th series on so that that is what we are talking about.

The Court: What about the first paragraph of Section 7?

The Witness: I had wanted to take a look at it. I am not certain whether it is or is not in that as well, but it certainly is consistent, the 12th series, and if we take this in terms of your Honor's statement this morning with reference to where we are today, it certainly is here today and has been through the period which you are addressing yourselves, namely, 1960, '62 and on.

The Court: Section 7 has not changed, then, from the 12th series on?

The Witness: That is my understanding.

The Court: Now, does this provide for any limitation the use of consolidated bond reserve funds to pay the operating deficits [598] of a facility acquired without the issuance of consolidated bonds?

The Witness: This does not permit such application.

The Court: What language specifically contains the prohibition?

The Witness: Section 7 states the Authority shall not apply any moneys in the consolidated bond reserve fund or in any special reserve fund established for the benefit of bonds of any prior issue except for the payment of bonds secured by a pledge of the general reserve fund in whole or in part.

The payment of debt service upon bonds so secured, then without reading the whole of it, your Honor, it goes on to speak only of undertakings with respect to bonds secured by a pledge of the general reserve fund, in whole or in part.

If I may, your Honor, could I heard your question, because I assume that you are going to ask a series of questions based upon it. May I hear your question that you raised?

The Court: Yes.

[The reporter read back as requested.]

[599] The Witness: Your Honor, there is here with regard to Subdivision [g] an area which we have not specifically addressed at the Port Authority which would raise a question in this regard, namely, could you apply moneys under Subdivision [g] from the consolidated bond reserve fund for bonds which

are general reserve fund bonds, but not consolidated bonds, and that would not appear to be proscribed.

If I take your Honor's question to include when you say without the issuance of consolidated bonds to mean without the issuance of bonds backed by the general reserve fund, the answer would, I think, be completely accurate in regard to my understanding, but it is perhaps in the present context, a distinction without a difference.

By Mr. Sovern:

Q. I take it the key point in Section 7 of the [Series] Resolution, plungs the gap you identified in Section 7 [g]of the consolidated bond resolution? A. Well, Section 7 in its totality—

The Court: Not just the first paragraph? I thought you derived that from the [600] first paragraph, that is why I said—

The Witness: If the gap be defined as whether you could issue bonds extraneously or just—

Q. As I understand the gap, what we have been talking about is the white elephant hypothesis—that is to say, a gift of a facility, deficit-generating mass rail transit is made to the Port Authority and the question is may the consolidated bond reserve fund be used to pay the operating deficits of that enterprise and the question I need to put is to the extent that 7[g] permits that, does not Section 7 of the series resoltuion preclude it? A. In order to bring a facility, without characterizing it, into the family of facilities, one would have to issue an obligation secured by the general reserve fund.

Mr. Sovern: Thank you.

[601] The Court: Now that much is contained in the first paragraph of Section 7.

The Witness: I believe that is so, your Honor.

The Court: Now we will get to the second paragraph of Section 7 which we have been referring to here as the Section 7 certification.

The Witness: Would you like me to describe that at this time?

The Court: Yes. What is the certification which the Authority must issue before it can authorize the issuance of further consolidated bonds?

The Witness: Your Honor, Section 7 certification contained in Paragraph 2 is a certification which must be made by the Authority prior to the issuance of Consolidated Bonds or at the time of the issuance of Consolidated Bonds for the application of the funds.

That certification consists of the opinion of the Authority that the issuance of the bonds or the pledge of the General Reserve Fund as security for bonds other than [602] consolidated bonds will not, during the ensuing ten years or during the longest term of any of such bonds proposed to be issued [whether or not consolidated bonds], whichever shall be longer, in the light of its estimated expenditures in connection with such additional facility or such group of additional facilities, materially impair the sound credit standing of the Authority or the investment status of consolidated bonds or the ability of the Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of consolidated bonds.

Those are substantially the words behind it. But the meaning behind it, and what happens with respect to an additional facility is that that facility

coming into the group of facilities with the first issuance of bonds, for example, a new passenger ship terminal or whatever you might consider, is analyzed and judgment made, assuming we are to go ahead with it, that issuing bonds for that facility and bringing them within the family will not impair the credit of the entire enterprise.

[603] That I think is the most important concept of this judgment which is made as to whether or not the facility should be taken into this group.

The Court: Well, that is not the only certification that is required.

The Witness: Your Honor has reference to—

The Court: Impairing the sound credit standing of the Authority or the investment status of the Consolidated Bonds—is that right?

The Witness: That is right.

The Court: —or the ability of the Authority to fulfill its commitments. Now I can appreciate—

The Witness: When I said impair the standing, perhaps I abbreviated too much. I meant to read the word hereafter to refer to them.

The Court: But do I understand correctly that before the bonds can be issued under such a resolution the certification must be made that all three conditions that are set forth in this sentence must be met?

The Witness: Oh, yes. There would, if [604] the commissioners decided to go ahead with a new facility in this way, be a resolution adopted which would so provide.

The Court: Now forgetting for the moment what the words impair the sound credit standing of the

Authority may mean; what do the words investment status of consolidated bonds have reference to?

Is that to the Moody's or Standard and Poor's rating? Is it to the question as to whether they are legal for investment purposes for trusts and so forth?

The Witness: Your Honor, I have given some considerable thought to the meaning of this over the years, and also since Monday afternoon when I was asked to come down here.

What your Honor has asked is a very difficult question, because this particular section is quite different from some of the other sections which we have discussed, say the 1.3 test and so forth, where there are mathematical computations to be made.

In my opinion this section permits of a range of possible answers to your question. And the range of possible answers to the question [605] of what the investment status means, and many of those other phrases in the section would range from the commissioners' or a commissioner's judgment—because I assume that each one would think about this thing individually and get the benefit of the group's understanding as well—would range from a commissioner's judgment that he thinks that there will be over the years sufficient amount available from all of the sources that we have discussed to pay principal and interest when due on the bonds, all the way through the other protections which we have. For example—

The Court: Are you going behind the words investment status?

The Witness: No, your Honor.

The Court: You are just confining it to investment status?

The Witness: Yes.

The Court: Does investment status have reference in your opinion to a Moody's rating or a Standard and Poor's rating?

The Witness: Your Honor, I did not draft this resolution. Investment status means what it is which affects the bonds as far as our [606] ability to issue the bonds is concerned and its market relationships to the bonds and so forth.

It takes in the whole area of an investor's willingness to buy our bonds. It takes in the whole area of what happens to those bonds in the hands of the investors.

And that is why I say that judging from all of the things that I have read and listened to, different individuals have different ideas about that which are not encompassed solely within Moody's rating.

Some people indicate—when I look at this I have to look at it from the standpoint of an analyst looking at what other components are making up the investment status of Port Authority bonds. What is it that makes them what they are?

The Court: I take it what you are saying is that there are no objective criteria or no single criterion.

The Witness: No single criterion. If you would like the benefit of my thinking on it, what the criteria are, not generally, but just Port Authority bonds, they would range from, as I say, just the payment of principal and [607] interest through the kinds of things that we were discussing this morning, namely, would the issuance of such a bond impair the ability of the Authority—

The Court: To fulfill its commitments?

The Witness: Right.

The Court: All right. Now, as to that phrase—

Mr. Sovern: Which phrase, your Honor?

The Court: The ability of the Authority to fulfill its commitments. If the Authority were contemplating the issuance of consolidated bonds for the acquisition of or the construction of a mass transit facility, and the projections made by the Authority showed let's say an operating deficit of $100 million a year for the next ten years; in your opinion could a commissioner or could the commissioners issue a certification satisfying the requirements of Section 7? And here we are today, and assuming the Authority's financial statement as it presently exists.

The Witness: Your Honor, that would require an answer which I would need and would ask in that situation if that was presented to [608] me, that here we want to take on this particular deficit; I think the commissioners would also be interested in projections of revenues from other facilities.

The Court: Of course.

The Witness: And so we would be speaking not only of today's statement but rather our analysis of where we would be over the next ten-year period.

The Court: Right.

The Witness: So, for example, if a commissioner were to state or in thinking it through himself, or whoever was judging this thing also to feel that revenues were to be substantially increased over the next ten years; the answer to that question might be under Section 7 that it would be suitable.

For example, and again we are talking about—

[609] The Court: He couldn't just sit there and turn his head upwardly and say, "Yes, I think we're

going to have enough money." He'd have to base it on some objective projections that were made by somebody.

The Witness: Your Honor, that's exactly what happens.

The Court: What?

The Witness: There are projections made.

The Court: Right.

The Witness: For example—

The Court: Hasn't it been the practice heretofore in connection with the issuance of consolidated bonds since this Section 7 certification requirement has existed that the Commissioners have presented to them by the staff of the Authority who are responsible for making those projections a set of projections which shows what the anticipated revenues will be over a ten-year period, at least ten-year period, and what the debt service requirements will be, etcetera, so that they can make this certification?

[610] The Witness: Your Honor, just such a certification was made in connection, for example, with the undertaking of the Hudson Tubes, and in that situation the Commissioners anticipated that there would be a deficit of between 5 and 6 million dollars, which they could accommodate within the family.

They also anticipated that there would be, in their judgment, not looking up to the sky, but looking at analysis, that all of the future deficits of the 5 to 6 million dollar amount would be accommodated through fare increases and made their certification on that basis.

The Court: Well, you see now that sounds slightly partisan, if you don't mind my saying so, because that's not the question which I asked. All I

asked was that heretofore with respect to any issue, whether it was PATH, whether it was World Trade Center or any particular issue, the Commissioners sit with projections in front of them before they made such a certification.

The Witness: Your Honor, if that was [611] a partisan statement I beg your pardon. It was intended as an example, and I had another example in mind.

The Court: No, I don't want examples. All I want is to know what the practice has been? Has that been the practice or hasn't it been?

The Witness: The practice has been as I described it.

The Court: They do have the projections?

The Witness: The Director of Finance will make certain projections and assumptions which he will present to the Commission.

The Court: So the accuracy of those projections, and here the certification, will depend, presumably, upon how good the people are who made the projections and the assumptions which they used. Right?

The Witness: I don't think it depends entirely on the people who have made the projections, your Honor.

The Court: Well, I only meant that in the sense that—

The Witness: It has to do with what [612] then happens over things which such people may or may not have control over. For example—well, I'm sorry.

The Court: But presumably there is as objective a set of facts, projections in front of the Commissioners as you can get. Is that a fair statement?

The Witness: Your Honor, it's going to be difficult for me to discuss this without any examples whatsoever.

Let me take bridges and tunnels as an example, if I may.

The Court: All right. Why don't you take the second deck of the George Washington Bridge.

The Witness: All right. Well, with respect to the second deck of the George Washington Bridge or with respect, say, to a resurfacing of the bridge, which we now are thinking about, we may have a need. This is also hypothetical. Okay? We may also have a need to have additional revenues in order to support that resurfacing of the bridge.

In that situation you might project that an increase in bridge and toll revenues, [613] bridge tolls would be adopted by the Commissioners and approved by the Governors and accepted without challenge by the Department of Transportation, which has the ability to determine the just and reasonable tolls over the bridge, or you might have something more definite involved.

In such a situation as this, a Governor may have given an assurance that he would not veto such an action, or the Department of Transportation may have analyzed it.

The Court: Let's not get involved with those matters, please. And I would prefer staying with something which actually happened. They did put a second deck on the George Washington Bridge.

The Witness: Right.

The Court: That was done. That was financed through the issuance of consolidated bonds, wasn't it?

The Witness: Right.

The Court: Now, before the Authority issued the certification required for the bonds, I assume that the staff prepared [614] projections showing what the additional income would be as the result of the installation of the second deck on the bridge?

The Witness: Well, your Honor, I'm sure there were projections, but there were not projections under this section.

The Court: Well, don't they have to have them, that's all?

The Witness: No, your Honor.

The Court: Well, what was the past practice of the Authority?

The Witness: The only past practice to which I may refer, your Honor, are things to which I have alluded such as the PATH certification and passenger ship terminal because the second deck of the George Washington Bridge is a matter with respect to an existing facility. And this certification need be made only the first time bonds are issued for a facility, not each time bonds are issued. This is as distinguished from the 1.3 test which must be satisfied each time consolidated bonds must be issued.

[615] The Court: All right. I've got it. I've got your point. But with new facilities, then, that were issued and which were constructed and financed through consolidated bonds, wasn't it the practice of the Authority to waive the objections made to determine whether or not the issuance of the bonds would impair the ability of the Authority to fulfill its commitment to the holders of consolidated bonds?

The Witness: Your Honor, those projections were made. However, in the— and I don't mean that they

were not made carefully. I assume they were made carefully. But in the actual practice of making such certifications under Section 7 there was at the time those certifications were made, not describing it, your Honor, but with respect to PATH or other of the facilities which were certified, some heliports and other kinds of things, and there have not been a great number of these because you will recognize that many of the facilities were in place before that. There was reasonably wide latitude when considered as part of the [616] revenue flow of the entire Port Authority. So that a Commissioner focusing on this might be wrong within a very wide latitude of millions of dollars as far as an exact projection is concerned and still be perfectly right with regard to this provision because the provision might not cut in at all points along the way.

If you say that as part of the investment status of Port Authority, you will consider something that we have not yet talked about, for example, the policy of the Port—

[617] The Court: I just want to dwell on this one phrase for the time being and see if I can understand what is required of the Commissioners in order to make the certification, and as I understand it, and maybe I don't understand it, they do have projections, don't you agree?

The Witness: Yes, your Honor.

The Court: And do those projections show that within the ten-year period by reason of the operating deficits that would be incurred by this new facility, the Port Authority would have depleted its consolidated bond reserve, it would have depleted the general reserve fund, it would no longer be able to

meet the debt service requirements on the consolidated bonds.

You mean to tell me that the Commissioners could then affix their signatures to a certification saying that the Authority's ability to meet its commitments is not impaired?

The Witness: Your Honor, under those conditions, if my advice were asked, I would say they should not so certify.

The Court: They could not, could they? [618] If they had a set of figures in front of them, showing all of those circumstances, what happens?

The Witness: Your Honor, I would not think that they would so certify. I can't speak for what they would or would not do.

The Court: I am only asking for your opinion.

The Witness: In my opinion, they should not so certify under that hypothesis. T 593-8 to 618-11.

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[621] By Mr. Landis:

Q. One question, your Honor, does the Section 7 certification have to be made in connection with improvements and additions to a consolidated bond facility?

The Court: You mean existing facility?
Mr. Landis: Right.

A. Well, the answer to that is no. At Newark Airport, the redevelopment program, for example, your Honor, as you will recall, that there was at one time the possibility of building an additional airport in New Jersey which was not constructed and yet the additional capacity was needed. The State had made a determination it did not want that

capacity in that particular location and the airport at Newark was rather modest in size, as major airports go. Today, it is one of the most modern and efficient airports in the nation.

I believe that the expenditure of 400 million dollars with more to come has been made at Newark Airport since the time—that the redevelopment was initiated and that was made without certification under Section 7. T 620-3 to 620-25.

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[622] Q. If a subway rail system were constructed within the geographic boundaries of Newark Airport or if it suits, perhaps, if the same answer would be the same, the geographic boundaries of Newark Airport and the adjacent Port Elizabeth, Port Newark facilities, all of which are owned by the Port Authority or leased by the Port Authority under their control, and that railroad would cost 50 million dollars to construct and would lose 50 million dollars a year in net operating loss above revenues, would a Section 7 certification be necessary for the Port Authority to embark on a sale of bonds to pay for the 50 million dollar cost?

The Court: Are you saying would that constitute an addition to an existing facility or would that be an additional facility?

Mr. Landis: That's right.

The Court: Do you have an opinion as to that?

Mr. Sovern: It might be helpful to give the witness a copy of bond counsel's opinion, that a statute could not define a railroad to be an airport.

[623] Mr. Landis: I believe that it was a different set of facts.

Mr. Sovern: All right.

Excerpts from Testimony of Michael Zarin

Mr. Landis: I have no objection to getting into that, but I would prefer Mr. Sovern do it.

The Court: If you can answer that question, do you have an opinion?

The Witness: That is a difficult question because it is a question which has not only to do with the Commissioner or the Port Authority's judgment, there has been a legislative judgment that certain railroad facilities are in fact part of an airport, so that I am not so sure that counsel's opinion, Mr. Sovern, goes so much to the issue of Section 7, it goes to the issue of the 1962 covenant.

The Legislatures have, in effect, made the determination that at least certain railroad facilities by redefining the term airports, have made certain railroad facilities part of Newark Airport or part of Kennedy Airport, as I understand it.

That poses for the Commissioners and the [624] Authority a very difficult problem, mainly is this airport part of the facility or isn't it? The easy answer to the question is, it is part of the airport because the Legislatures have so determined it to be part of that airport.

As a matter of fact, when we were trying to build these airports, railroads and so forth within the covenant which we still are—I am sorry, I should not say that—at any rate, there was a theory that was propounded called the "adjunct" theory, which said that if the railroad was part of the airport, why could we not construct that facility and the Commissioner's easy answer, as I say, the definition of the airport now includes a railroad.

Therefore, the airport being an existing facility would not need to be certified in answer to your question.

Excerpts from Testimony of Michael Zarin

I think, myself, the question has a little bit more difficulty than that attached to it because in that event, what else could you add to the airport, but it is a question which we have not faced. In other words, [625] your Honor, if the World Trade Center had been defined to be part of the airport, could we then not have to certify the World Trade Center? I don't know, and that is why the theory is propounded as an adjunct theory, because at least this railroad would be going to and from the airport and some questions involved in that discussion ranged along the lines of if it was a railroad, just to the airport, would that be part of the airport or if you had commuter stops on it, would it not be, and so forth, even before the Legislature made that determination, but once they made the determination, I think your Honor will appreciate the difficulty of counsel advising that it is not part of the airport when the definition says it is, and what that advice would be, I don't know, because actually that problem was resolved in a different context which you will probably get into, namely whether it is part of an airport or an, it is still a railroad, and that I think is the opinion which Mr. Sovern was alluding to, namely that if it is a railroad, whether or not it [626] is part of the facility, there was a covenant protection for it. That is the way the analysis went. T 622-2 to 626-3.

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[630] The Court: If no one has thought of any more questions we will get to the covenant.

In what way does the covenant grant to the consolidated bondholders any greater protection than

they already had under the terms of the consolidated bond resolution and the Series Resolutions against the assumption by the Authority of a substantial deficit operation in the mass transit field? T 630-1 to 630-9.

• • •

[631] The Witness: I believe that this morning, your Honor, we had commenced some discussion of this subject, and that we had been discussing the permitted purposes set forth in the covenant protection; the covenant providing that the resources, the revenues and so forth [632] of the Authority would not be pledged for any other purposes whatsoever other than permitted purposes, and we were discussing the permitted purposes under the mathematical deficit test. Your question—

The Court: As I understand Subsection 6—let's take the two aspects of the Subsection 6[b], the permitted purposes which are involved here. They could acquire, construct, operate a rail mass transit facility, if the Authority first certifies that the facility is self-supporting. Is that right?

The Witness: It could be approached from any particular way, and that is certainly a good way to approach it, the first or second—certainly if it is self-supporting.

The Court: That is right, if it is self-supporting. They include here a definition of what self-supporting means, that at the time of the certification the amount estimated for the ensuing ten years to be the average annual net income—which I guess is synonymous with the net revenues as that term is used in the consolidated bond resolution—derived from or incidental to such facility, equals or exceeds [633]

the amount estimated for such ten years to be the average annual debt service upon the bonds, presumably issued for purposes in connection with the facility. Is that right?

The Witness: That is correct. Essentially that is what we would call a one-times coverage.

The Court: One-times coverage.

The Witness: Right.

The Court: Now in order for the commissioners—I take it the commisioners must make the certification.

The Witness: Your Honor, in this case as distinguished from the previous case, the commissioners must make the certification. But I believe that the certification must also be signed by the governors. In the last sentence at the conclusion of Section 6 it says: Anything herein to the contrary notwithstanding any such certification by the Port Authority hereunder shall not be effective unless and until affirmatively concurred in in writing by the governors of the said two states.

The Court: Right. Now in order for the commissioners to make the certification I [634] assume that they would have to make projections.

The Witness: Subject to—I won't say the same thing to you I said to Mr. Landis. But subject to what I said to Mr. Landis the commissioners must certify it.

The Court: And they would have to have projections available to them of what the average net income would be and what the debt service requirements would be.

The Witness: Yes, your Honor, they would.

The Court: Isn't that the same thing they would have to have in front of them to make a Section 7 certification that we were talking about before?

The Witness: I think in regard to this section they would have to have something more than under Section 7's certifications for a couple of reasons: one reason being that this certification as distinguished from the Section 7 certification is not certification as to whether the Port Authority may meet that facility within the whole family of facilities.

In other words, there is a great deal more room for a range in that projection under [635] Section 7 than there is under this Section 6. As a commissioner you would need more precision to be able to get the answer to this subject. There are some other differences as well on that point.

The Court: I think I understand what you are saying. But in essence there must be projections made, so that the commissioners can make a determination whether they can certify.

The Witness: Your Honor, there must be projections; the bases of those projections are quite different one from the other.

The Court: I understand that. Now it was suggested I thought in some of the questions which were asked of you in connection with the Section 7 certification that it would be possible under Section 7 for the commissioners to indulge in a lot of latitude, but they were subject to pressures; and I think you were indicating that that would be a factor et cetera in making the certification.

The Witness: Your Honor, I made the statement that I was not able to judge what the commissioners

would take into consideration. And I am certainly not here to characterize the [636] actions of the commissioners of the Port Authority.

The Court: But presumably I can, if we assume that they are acting in good faith in both instances in making their certification. Is that right?

The Witness: Of course.

The Court: Then one would be really the equivalent of the others.

Let me go about it the other way.

If you want to attribute bad faith to the commissioners they could just as easily make a certification that a facility is self-supporting as they could that the Authority would be able to meet its financial commitments under Section 7.

The Witness: Your Honor, I am prepared to discuss the requirements of Section 6 and the requirements of Section 7. I am not prepared to discuss or characterize the commissioners of the Port Authority.

The Court: No.

The Witness: I could compare those sections and tell you I find certain differences and certain similarities. But as to the [637] commission's motivations I can't—

The Court: I grant you, we are not trying to go into—

The Witness: Furthermore I have some board meetings to attend after I leave this courtroom.

[638] The Court: No, all I am suggesting to you is this: that if one wants to assume that the commissioners would act in bad faith, which is an assumption that I would not make, moreover I'm not asking

you to make an assumption, other than for the purpose of this question, so if one wants to assume that they would act in bad faith they could make a certification as to whether a facility is self-supporting under this section just as easily as they could under Section 7.

The Witness: Your Honor, I respectfully differ with that statement. I'll be glad to explain why.

The Court: Please explain why.

The Witness: Your Honor, in order to explain this it would be helpful to utilize precise examples, and I don't know whether your Honor wishes to—

The Court: I don't want to get involved really in examples.

The Witness: All right. Then let me just read from the—let me just point out the portions of the statutes involved.

In a situation in which you are dealing with Section 7 under the consolidated bond resolution a commissioner would be permitted, [639] I would think, to rely upon understandings and projections with respect to his judgmental estimates of the future revenues of the Authority and that which he could reasonably assume would take place with regard to that facility and the entire family of Port Authority facilities.

On the other hand, when it comes to making up deficits with respect to the permitted deficits on Page 60 of my book, but I guess it's Section 6 under the definition of permitted deficits, you would not have to consider the amount of deficits as of the time of any certification hereunder for the payment of which one or both of the two states in connection with the proposed other railroad facility as to which the certification is made and in connection with the prior other railroad facilities has made adequate, secure and effective provision for the duration of the period for which the Port Authority is liable for such deficits.

Now, that means to me—

The Court: Doesn't that refer to the second half of it? That doesn't relate to a [640] self-supporting facility. That refers to a permitted deficit rail operation coming in under the second half of the permitted purposes.

We are still talking about a certification as to a facility being self-supporting. And they have a very exact definition of what self-supporting means, which you said was a one-to-one test. And on the assumption that this would be, let's say, a new facility, the commission will have to have the projections made.

And, granted, that they would not have the latitude that would be available to them in a Section 7 certification, because now you would only be focusing upon the operations of one specific facility. Nevertheless if you want to attribute bad faith to them they could either enlarge the projections or, let's say, be very liberal in their projections of the income and very restrictive in their projections of the expenses to show that it is self-supporting, couldn't they?

The Witness: Your Honor, I'm not assuming, of course, that anybody would be more than looking at the particular certification. [641] I don't know whether I read the statute precisely in that manner. I see in the statute taking them in progressive steps that your Honor is pointing to this one paragraph with respect to self-supporting as a certification. I would point out, as I have in that regard, that if you

wanted to make those projections you would in this particular statute have to make them with a much greater degree of care, first, because of the gubernatorial signature, which means that, I take it, that when a governor makes a certification he does not just sign his name also, but that it is there for the purpose that those certifications be subjected to a retest.

I would say to you as a person who has worked in government for a long time that when something is going to a governor it is treated with certain degree of great respect. So you would certainly not want anyone in the Governor's office, let alone the Governor, to be able to come back and say to you one thing or another about the certification.

That is not to say that the certifications under Section 7 would not be conducted with care, also. But if you want to talk about latitude [642] there is not that much latitude in this which there might be under that other one with relation to the asumptions which you make.

[643] The Court: All right.

The Witness: The second thing I woud say, and, of course, we are looking at some things through different eyes than we have to look our own in analyzing some of these things, but I would read this statute in a way under which a portion of these two tests, one self-supporting, and one deficits, are really two sides of the coin, namely if you found that there was a deficit, you could take care of that deficit in a particular manner under this statute either as I think we went into this this morning, a little bit out of the estimate of the general reserve fund or if there was an actual deficit.

The Court: I don't see how you can—maybe you can explain it further to me or maybe I am missing something, but as I read the statute, there are two types of permitted purposes with respect to the passenger rail transit. One is if the Authority certifies that the facility of that is self-supporting as hereinafter defined and the very next paragraph contains a definition [644] of self-supporting.

They were not involved with any question of deficits in that certification because by definition it has to be self-supporting.

Now, the other class of permitted purposes where you do have a deficit operation and just want to try to get over the first half, the first hurdle, and to contrast the kind of certification that you get there with the Section 7 certification.

The Witness: Your Honor, let us take an expenditure, a projected expenditure for operations on this railroad which is, let's say, the wages of the employees on this railroad and let us say that we estimate that the revenues under certain assumptions will be adequate to meet those projected wages and if in fact there is an increase in the fare over a certain period of time.

Now, as I understand what your Honor is asking me to opine, if in fact there was an inadequacy or a shortfall in that so that there were certain deficits, it was not self-supporting, that I might—and yet I am going to make that up in my judgment [645] with a—with a certain adequate, secure and effective provisions from the State, if there were a deficit and I could make it up with adequate safeguards—

The Court: We are not talking about deficits.

Excerpts from Testimony of Michael Zarin

The Witness: Your Honor, I am construing the same Section, we are dealing with the same Section and we are dealing with a statute which is providing for particular protections and I am just trying to understand how it is that a piece of an estimate which is not yet in hand in one part of this Section, namely the self-supporting section, should be treated differently from the protection which you would have to have if you had a dollar's worth of deficit.

In other words, this statute has within it the requirement, if there were a dollar of deficit and we were able to do this, that there be adequate, secure and effective protection or it be within the area of support and I cannot see why, at this moment, why in the self-support section, if we would just consider this generally, why that element of [646] revenues does not also need to be that sure.

The Court: All I am saying to you is that the Legislature that the Authority must certify that the facility is self-supporting. They have furnished us with a definition of self-supporting and in order to make that definition, one has to project the revenues.

The Witness: That's correct.

The Court: And the expenses, the debt service requirement, you fairly well know that that is not a problem.

Now, that is a projection of income and expense and all I am saying is that it is the same kind of projection of income and expense, I grant you, that there may be—you might have to be more exacting in making your projections, if you are acting in good faith.

The Witness: Because it is one facility.

Excerpts from Testimony of Michael Zarin

The Court: Because you are dealing with one facility rather than the whole panoply of facilities that the Port Authority has, still the certification is [647] based upon the projections.

The Witness: Without any doubts, it is based upon projections.

The Court: Now, you get to the second kind of permitted use and that is where you do have a deficit operation and perhaps you could explain to me how that operates in terms of how much of a deficit operation is permitted.

The Witness: A deficit operation is permitted under the permitted deficit definition and there it is stated, as I have indicated previously, that that deficit may be made up with adequate, secure and effective provision for the duration of the period for which the Port Authority is liable for such deficits is one way in which the deficits may be made up.

The Court: Now, let us go back to the beginning. At the very outset before you can go into a deficit operation, the general reserve fund must be full. Right?

The Witness: That is correct.

The Court: Okay.

The Witness: Well, I went directly to the permitted deficit definition, and [648] in going to the permitted purpose section.

The Court: You have to have your full reserve fund intact.

The Witness: That's right.

The Court: When the deficit of the new operation is combined, plus the PATH that was organized under Section C?

The Witness: That is correct.

Excerpts from Testimony of Michael Zarin

The Court: Cannot exceed the permitted deficits.

The Witness: That is correct.

The Court: Now, to get the permitted deficit, then we drop down to, first of all, the definition of a deficit. Right?

The Witness: That is right.

The Court: Now, what is your definition of a deficit, if you can give it to me without reading the paragraph?

The Witness: Well, the definition of the deficit is essentially the same definition as deficits. It is a definition which runs along the same lines as the definition of self-support which we discussed before.

It is a measure of income and outgo [649] and if the outgo over a ten-year period exceeds the income, you've got a deficit.

The Court: So again that is based on a projection?

The Witness: Again, it is based on an estimate by the Port Authority.

The Court: Now, the permitted deficit, supposing we went after that?

The Witness: That estimate, of course, also is—has a gubernatorial concurrence.

The Court: Yes.

The Witness: Well, now, there are essentially two methods of meeting that deficit.

The Court: A part is if you get the states—some kind of commitment that satisfies you?

The Witness: If there is adequate, secure and effective provisions.

The Court: That they are going to make up the deficit.

Excerpts from Testimony of Michael Zarin

The Witness: Right.

The Court: Now, we come to B.

The Witness: The B portion is essentially where we were this morning, namely [650] a measure of ten percent of the general reserve fund or an equity measure which essentially is measuring the same thing except that it is a testing situation in which the Port Authority has paid off a considerable amount of its obligations so the equity measure plus the ten percent of the general reserve fund would be a great amount of permitted deficits. We can go into that in some detail.

The Court: I do not think it is necesary. T 631-20 to 650-13. • • • So as I understand, if we go back to 1973 and take the Authority's financial statement or annual report for the year ending December 31, 1973, exhibit [III to the Stipulation], applying the B formula, the permitted deficit that would be authorized under B, could you show me how you calculate that?

I see it is ten percent of the general reserve.

The Witness: That's right, your Honor, [651] it is a moving decimal point calculation.

The Court: It does not include the consolidated reserve?

The Witness: That is correct.

The Court: Just the general?

The Witness: Just the general.

The Court: So you had 156 million dollars, approximately in the general reserve fund, right?

The Witness: If that is the amount, I am sure it is. This is the January 1 balance, your Honor. The balance of December 31, is 173 million.

The Court: Okay. So you have 173 million so you could have a permitted deficit of 17 million under that test.

The Witness: Approximately so, yes.

The Court: Applying the second part of the test, would you have a greater amount?

The Witness: No, your Honor, my understanding, and I am not testifying as an expert as far as the accounting is concerned, but my understanding is that the general reserve fund amounts to ten percent would give you the higher of the two.

[652] The Court: From what I understand, I think somewhere in the stipulation, the [loss] or the deficit from the PATH operation which must be included in the permitted deficit, right, exceeds the 17 million.

The Witness: Both statements are correct.

The Court: So therefore under the application of this formula, the Authority would be absolutely prevented in engaging in any rail transit operation.

The Witness: No, your Honor.

Mr. Sovern: Which is not—

The Witness: Which was not self-supporting.

The Court: Which is not self-supporting. T 650-16 to 652-17.

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The Witness: Your Honor, under the definitions, there are many railroad operations which could be self-supporting.

The Court: I realize.

[653] The Witness: Because we talked about adequate, safe, secure—

The Court: Are you suggesting that in the definition of self-supporting in the statute, the Authority

could take into account the state commitment?

The Witness: Yes, your Honor.

The Court: That would render them self-supporting?

The Witness: Yes, your Honor. T 652-23 to 653-11.

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[655] The Witness: Well, we have talked—that was the question, your Honor, that I understood you to be interested in, and the question, as I understood you to have addressed to me in which I considered since Monday night and we discussed most of the aspects of it, we discussed the exactness of this, of some of the mathematical computations of this distinction to Section 7 and we discussed the limit on 7, but we have not discussed at least from the standpoint of drawing the distinction, I think, your Honor probably has this in mind, is that in bringing an additional facility on line in the railroad area, we have under Section 7, the PATH railroad certified under Section 7 of the series resolution.

If we had done that and there had been no covenant protection under the statute, then we'd be in a position today of being able to add to the PATH railroad and take it to Plaintfield, say, as we are trying to do on a self-supporting basis [656] on the basis of an additional certification.

What this does in Section 6 is to say in paragraph "i" under purposes, that the permitted purposes include the Hudson Tubes as authorized and limited on the effective day of this covenant and the agreement. Then anything additional must be certified, as your Honor has very carefully pointed out when I went originally to the permitted deficit section

rather than staying with the permitted purposes exception for a longer period.

When you look at it that way, you see in some respects that it is really the heart of what it is that we are talking about.

We were able to undertake the PATH system, extend it 200 million or whatever it is on PATH, but we were not permitted to undertake additional operations, and your Honor knows that the deficits under the statute, as far as the Hudson Tubes are what we now call the PATH system is concerned, are not limited by the covenant. We may develop the PATH system and have [657] beyond, for example, the estimates which may have been before the Commisioners at the time of the PATH certification in the case of an additional railroad facility.

However, we might not go immediately on as, for example, we were able to do in the Newark Airport situation and that, in essence, is the covenant protection that we are talking about and I felt that without saying that to you, I would not have answered your question.

[658] The Court: All right. Well, couldn't the Authority then provide or, let's say, button up that loophole simply by amending the consolidated bond resolution or by changing the form of the series resolution?

The Witness: To do what?

The Court: So that a certification under Section 7 would be required whenever you are going to add to an existing facility.

The Witness: Could we increase the protections under Section 7?

The Court: Right. As I understand you, and unless I just didn't comprehend what you just said, you said that the covenant gives greater protection than existed under the series resolution Section 7 certification because once having acquired PATH without the covenant you would then not have to issue any Section 7 certification to extend the PATH operation. But with the covenant now you must make certification. T 655-2 to 658-22.

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[661] All right, do you have any other reasons for your statement that the covenant [grants] greater protection than what the bondholders had before?

Now, for example, I assume that the covenant does not give the bondholders any protection at all against the Port Authority's assuming other massive deficit facilities [662] other [than] rail transit.

The Witness: As far as that's concerned, your Honor, the covenant only applies to railroads. And that really is an example of response, as I've looked at it, that was made to the problem that was presented at that time. We, for example, as we just discussed in connection with the ability to free the consolidated bond reserve fund a little more, we were able to do that. In essence, these covenants, and I've negotiated some of them, are exactly that, a process of negotiation, and even within the covenant itself if it was opened up actually—actually today I don't think it's significantly greater. It would be if—if the original projections were true for example. I don't mean that they weren't, held true. If the original protections had held true with respect to PATH, that is to say that the fares had been increased as we went

along and we were still at the 5 million or 6 million dollar figure we would now have an ability to put $12 million per year into those deficits, but I think [663] your Honor is quite right that just addresses this particular problem and it doesn't address the problem, for example, that that Goldberg speech did of taking the school system into the Port Authority.

[664] The Court: Or a second World Trade Center, or let's say the hospitals of the City of New York. These are all deficit operations which somebody would like to pass off on to you.

The Witness: That is true, your Honor. This responded only to the one that was in the public eye at the time and not to others. . . . T 661-19 to 664-8.

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[674] [By Mr. Landis] Q. Would it be fair to state that the certification required under the 1962 covenant is a certification of an amount?

The Court: Certification?

Mr. Landis: Of an amount.

The Court: Which one?

Mr. Landis: The certification under the 1962 covenant.

The Court: But there are different kinds, self-supporting—

Mr. Landis: Whether it is self-supporting or deficit, I don't think in the context of the question it matters.

The Court: You say certification of an amount.

Mr. Landis: Yes, I am asking if that is a correct characterization of the certification.

A. I don't know, Mr. Landis, whether it is the certification of an amount in the sense that the amount itself would have to be spread on the certification. In order to make the certification you would have to [675] have materials, and certainly which would reveal that amount. I have not myself gone through the process of preparing—as Mr. Sovern indicated, I have not prepared such a certification for a facility. So I am certain it hasn't been done as yet under this particular statute.

In order to make the certification, if you were making it or if you were concurring in it, you would of course have to have documents which would show amounts. But whether the certification itself would say that you want to certify that this complies with Section so-and-so, and so forth, and that would be signed, or whether it would spread forth the entire economic analysis, I don't know at this point.

Q. It would be necessary to come to certain conclusions as to amounts, would it not? A. Yes, sir.

Q. Would it be fair to state that the certification required under section 7 would be the certification of an opinion?

Mr. Sovern: I think I will object, your Honor, the covenant is explicit and you examined at considerable length on this subject.

The Court: Yes. He apparently has never had to cross that bridge yet. That is what he is telling you.

[676] Mr. Landis: I am not sure what the answer is, but I am simply trying to get a characterization of what may appear on the record as a rather confusing discussion.

Mr. Sovern: I will withdraw my objection. The text of the resolution says it shall certify its opinion.

The Court: The text of—

Excerpts from Testimony of Michael Zarin

Mr. Sovern: —of the resolution about which Mr. Landis inquired. Section 7. He asked whether the consolidated bond resolution the series resolution, Section 7, called for a certification of an opinion. I objected. I looked at it. I saw it does. I withdrew the objection.

The Witness: You are speaking now of the series resolution itself?

Mr. Landis: Yes, the Section 7 of the series.

The Witness: Mr. Sovern has read it.

Q. Do you subscribe to his answer? A. It says: If the Authority shall certify at the time of issuance its opinion. T 674-5 to 676-23.

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[684] [By Mr. Sovern] Q. • • • Mr. Zarin, tell me again why you regarded little "i" of permitted purposes as an important limitation? The Port Authority has in fact improved the facilities on the line and I thought you testified that had it been but for little "i", the PATH could have grown like Newark Airport, you would have added more. A. If I gave you that assumption, I'm just saying to you that little "i" delimited a particular system and took the PATH system as one—for example, let's assume that we started with your railroad, that you are talking [685] about B and that was little "i". We could have improved that railroad as much as we wanted to.

Q. Stay with PATH, if you would, please. You said little i was very important. Those weren't your exact words, but that was your message.

Now, what is its importance? A. The importance is under little i, you can improve PATH as a system as far as PATH is concerned.

Excerpts from Testimony of Michael Zarin

In contradistinction—and then taking the covenant protection, let's assume, if I may, and stop me if I am going out of your hypothetical, staying with PATH, you asked me to assume the covenant protections. Let's for a moment assume only section 7 with respect to little i.

Q. I'd really rather not.

The Court: Just stick with PATH, and the question, is really, what does little i mean?

A. Little i means that just as you can build a railroad across the George Washington Bridge without reference to the covenant, you may acquire and improve the PATH system without reference to the covenant.

The Court: But you could not add trackage to PATH, extended to—

The Witness: Your Honor, that is [686] precisely so, that is the nub of the—

Q. When you said little i was the nub of the covenant, what did you mean? A. I really am trying to explain that, and what I meant was the question to which I was really responding was really all through this thing, is what is the difference, what is the added protection of the covenant and little i illustrates the difference between PATH and say, Newark Airport in the examples I have given today.

In the case of Newark Airport, we were able to extend the Airport by agreements and it is in different locations and so on and so forth.

Q. If it were not for little i, you could have done that with PATH? A. If it were not for little i we could have done with PATH, right.

Q. That is what I thought you said, if you could have done that for PATH. A. Not if it were not for little i, I

beg your pardon. With little i we could do it for PATH. If it were not for the covenant, we could extend PATH as far as—let us put it this way, section 7 would not have to be put into play again with respect to little i as a facility, a railroad facility.

Q. If you want to tell me section i is [687] unimportant, I would take that, but I do not think you could have meant to say that it is the heart of the covenant in that it authorized the greater expenditures on the H&M because if you recall the Judge had just asked you an open-ended question, what else did the covenant do to protect bondholders that the other things didn't and as you did with me and I assume Mr. Landis, pointed out that little i limits the extent to which the H&M can grow. A. Mr. Sovern, I don't believe that I specifically referred in our conversation to little i. I believe that my first reference to that was here on the stand.

Q. You are quite right. A. Thank you.

Q. I withdraw that reference. I was just collapsing a lot of stuff together. A. What I was intending to say, and I have been very careful today, it is starting to get late, and when I said the heart of the matter, there are so many things that I could have characterized that way, and I am sorry I said the heart of the matter. It demonstrates to me the difference of PATH and the Hudson Tubes by putting it into the exceptions and saying it is not subject to the covenant, makes PATH the same kind of thing as other facilities except for one fact, and that is in order to [688] prevent it from being considered the same as those facilities, it says not PATH but—or Hudson Tubes, which is virtually synonymous. It says as authorized and limited on the effective date of this covenant and agreement.

Newark Airport on the other hand, does not say Newark Airport as authorized and limited on the effective date of

this covenant and agreement, so that settled PATH in one section and then if you wanted to do anything additional, you have to name it and certify it. Once you named it and certified it, if it meets all of those tests, then it too becomes part of the family but if you want to add to it you have to certify more to that.

Now, if that is not the heart of the matter, it has—maybe it is not and it has some importance.

Q. The paragraph at the end of the covenant says in the third sentence, "Each certification by the Port Authority hereunder shall be made at the time of the issuance of its first bonds," et cetera.

Now, I would suppose that that applies to PATH.

A. No, sir, it says, "In connection with a proposed other railroad facility," is what I have been trying to point to permitted purposes for.

Any other railroad facility. I assume this has nothing to do with PATH.

[689] Q. I wasn't fully—precise. I would assume it would apply to an effort to extend PATH beyond its present boundaries? A. Yes.

[690] Q. All right. So that paragraph, if you read it that way, would require a fresh certification if PATH was sought to be extended beyond its present boundaries. A. Precisely so.

Q. What does a little "i" do for the bondholders? A. Oh, little "i" doesn't help the bondholders. Little "i" is what we got.

Q. Okay, fine. I think I— A. We got— we got that. We got that. We got the ability to put all that money into this system. That's what this whole statute was about. T 684-16 to 690-13.

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Excerpts from Testimony of Michael Zarin

[711] Q. I take it there is no question, is there, Mr. Zarin, the bonds in the 40 and 41st series do not have the covenant in their contract? A. They do not have the covenant in their contract with respect to those obligations, right. I think the official statement—

The Court: That is your answer, that is sufficient.

Q. Now, second, I don't want to go into a long list, but you had not finished your answer— A. Well, your Honor, the official statement is put together in very careful terms with respect to the 40th and 41st series of bonds and states on page 17 in the statutory covenant against dilution of pledged revenues and reserves by additional passenger railroad facilities, remains in effect with respect to affected bonds and remains binding on the Authority, although it does not apply to the bonds of the present offering. T 711-2 to 711-19.

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Excerpts from Testimony of Austin F. Fitzgerald

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[721] AUSTIN F. FITZGERALD, 53 Central Avenue, Glen Rock, New Jersey, sworn.

Direct Examination By Mr. Landis:

Q. By whom are you employed and in what capacity, Mr. Fitzgerald? A. I'm employed by Weeden & Company, and at the present time I'm vice-president in charge of dollar bond deposits and I am also in charge of the corporate bond trading department, and have the responsibility for our activities in the long government bond area.

Q. What is your educational background? A. I'm a graduate of Saint Peter's College in Jersey City where I received a Bachelor of Arts degree with a pre-med major. I have also taken courses in NYU Graduate School of Business Administration.

Q. How long have you worked in the area of municipal bonds? A. For approximately 20 years.

I came out of service in 1954, joined James H. Olyphant & Company, became a registered representative.

I think I then switched to the firm of [722] Meaney and joined Weeden & Company in 1957.

Q. What did you do when you first joined Weeden? A. At that time, I was in the stock area of the firm.

I then moved into the municipal dollar bond trading area. From 1958 to 1962 I worked with another fellow in the department.

At that time I became responsible for running the department, and by 1970 I was responsible to, allowed by the firm to commit up to 30 million during any one trading day.

In August of 1973 I also assumed my additional responsibilities in the corporate and government area.

Excerpts from Testimony of Austin F. Fitzgerald

Q. Were you what is commonly known as a trader during that period of time? A. Yes. At this time I was a trader, which meant I would purchase and sell bonds for the benefit of the firm's account.

Q. At the present time what are your responsibilities? A. All right. At the present time I actively supervise the trading of bonds. Previously I was actively engaged each day in terms of the trading [723] responsibilities. At this time I now have the overall supervision of the dollar bond trading department as well as the corporate trading and our government activities.

In this I will confer with Allen Weeden, to whom I am directly responsible, as the president of the company.

Q. And what is the involvement of Weeden and the scope of that involvement in the municipal bond area? A. In terms of this Weeden is a major dealer, in terms of underwriting of securities, we also are participants in the secondary market and are major market makers in terms of this. Weeden itself has approximately 500 employees.

We have eight offices, which are located in San Francisco, Los Angeles, Chicago, Philadelphia, Boston, New York and London.

Of our business, it's broken approximately into the bond business is approximately 60 percent in the municipal bond area, 40 percent in the corporate and government area. Of our business in the municipal area two-thirds of this is done in the secondary market. We will take a position in a dollar bond area of, as I had said earlier, [724] of approximately as high as 30 million.

We would have transactions in Port of New York Authority bonds one given day, probably in the area of four to six hundred thousand.

Excerpts from Testimony of Austin F. Fitzgerald

We also would do business in the dollar bond area of between approximately two to three million in purchases and sales. Our total business in the firm for the year would come to approximately 25 billion.

[725] Q. Has Weeden been involved in underwriting Port Bonds? A. Yes, we have. We have been a major in the underwritings of most of the Port issues.

We also have been managers of several of the competitive bidding deals and the ones that we have not been involved in, those where we were lost out in the competitive.

Q. How many different issuers of bonds are you familiar with? A. Approximately one hundred.

Q. That is on a personal basis? A. Yes.

Q. And what kind of clients does your firm deal with? A. We deal primarily with institutions and dealers. Institutions would be composed of such as banks, insurance companies, public and private pension plans, municipalities, trusts, etc.

Q. And are the dealings of Weeden in the Revenue Bonds on a national basis? A. Yes, [they are].

Q. Is that true also of deals specifically with Port of New York Bonds? A. Yes, it would be.

[726] Q. Who are the major dollar bond dealers in the business today? A. The major ones would be Salomon Brothers, Barr Brothers, Merrill Lynch, Park Ryan, and ourselves.

Q. Specifically with reference to the dollar bonds that we are involved with here in this litigation, the Port Authority Bonds, who are the major dealers in those bonds? A. It would be Barr Brothers and ourselves.

Q. How long has your firm been making a market in dealing in Port Bonds? A. I guess about 25 years.

Excerpts from Testimony of Austin F. Fitzgerald

Q. Do you consider yourself to be familiar with the secondary market of Consolidated Bonds of the Port Authority? A. Yes, I would.

Q. How do you base that judgment, what do you base that judgment on?

The Court: On everything he has just told me.

Mr. Landis: Fine. I would then offer him as an expert dealer.

The Court: Any questions with respect to his qualifications as an expert?

Mr. Sovern: No questions. We accept [727] him as a expert.

Q. You are aware, are you not, Mr. Fitzgerald, of the subject matter of this litigation? A. Yes.

Q. And you have heard of the 1962 covenant? A. Yes, I have.

Q. What is your general understanding of what that means? A. Generally, it was considered as a security for the bondholders and it protected the diversion of the earnings of the Port Authority into deficit mass rail transit.

Q. What effect did the legislation repealing the covenant have on your attitude and your firm's attitude towards Port bonds? A. A very negative effect in terms of that. It greatly restricted the amount of money we were willing to commit to the secondary and primary market. As soon as we became aware of the possibility of the repeal.

I might add, that we were undoubtedly not alone in terms of this feeling. In other words, the feeling of the community was—we could determine that they were less willing to make commitments in terms of this and this had a great effect in the market in terms of the fact that the market was no longer as viable a market [728] as it had been prior to the repeal of the covenant.

Excerpts from Testimony of Austin F. Fitzgerald

Q. Since the repeal, has Weeden continued to make a market in Ports? A. Yes, we have continued to make a market and we will continue to make a market. However, we no longer do it to the degree, nor commit the capital that we would have prior to this, and in addition as to not being willing to commit the same amount of money, we also wish to receive a greater margin of profit in terms of the amount that we commit. In other words, the risk has increased, so therefore the profitability should.

Q. In general, how would you describe the market for the Port bonds since the repeal of the covenant? A. Very thin and very sensitive. T 721-2 to 728-15.

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Q. Do you still deal with any investors? A. Yes.

[729] Q. Would you explain that? A. Yes. While I no longer have the day-to-day responsibility, or while I have the responsiblity I no longer conduct the activities myself. There are still people with whom I will talk and discuss things in this manner.

Q. What effect did the repeal have on the attitude of those people? A. They no longer will either buy the bonds outright, nor will they buy them on swaps. This is true of customers such as Banker's Trust, United States Trust, Connecticut General, Fireman's Fund, First National Bank of Chicago, First National Bank of Louisville, and St. Louis Union.

Q. What effect, then, do you see that the repeal has had on the market for Port bonds? A. Basically it has had a very negative effect, and the repeal of the covenant has caused the bonds to decline to a much greater degree than other comparable bonds during this period of time. It also has—

Mr. Sovern: Excuse me. Would you say what period of time, please?

The Witness: The period of time of the repeal.

Mr. Sovern: Down to today?

[730] The Witness: Excuse me?

Mr. Sovern: Down to today's date? Yesterday's? What is the cutoff period that you are referring to when you say during this period of time?

Mr. Landis: May I object to cross-examination during the midst of his answer.

Mr. Sovern: It is not cross-examination. I was objecting to the question as insufficiently clear, if you would prefer that I do it that way.

Mr. Landis: I think you should object before he starts to answer the question rather than after he starts to answer the question.

The Court: I think Mr. Sovern was asking the witness that just for purposes of continuity. I think it would be proper to specify what period of time you are talking about. You say since the repeal to date?

The Witness: Yes.

The Court: The decline has proven greater in comparable bonds?

The Witness: That is true. Although when you say today, there has been an improvement in the market in the bonds.

The Court: In Port Authority's [731] particularly or in all bonds?

The Witness: In all bonds. However, the improvement in the Port Authority bonds has been greater recently than the improvement in some of the other bonds.

The Court: When you say recently, could you indicate approximately when, for Mr. Sovern's purposes, that improvement began? You do not have to give an exact date, but just generally a period of time.

The Witness: I would say approximately in the middle of January, the first week in January.

By Mr. Landis:

Q. Do you have an opinion as to the result— A. Yes, in terms of this: that this has caused this negative effect, and if the repeal in our opinion, if the repeal does not take place, the covenant is still allowed to stand that this will then continue into the future. In other words, if the covenant is not repealed we will see a further decline in terms of the price of the Port of New York Authority bonds. T 728-22 to 731-22.

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[732] Q. Would you explain what your opinion actually is? A. Basically it is that obviously the covenant was repealed. So unless the covenant is reinstated, we will continue to see the same type of thing that takes place in terms of the price of the bonds.

Q. You mean—A. A decline in relationship comparable to the bonds. T 732-9 to 732-16.

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[734] *Cross-Examinaton By Mr. Sovern:*

Q. Mr. Fitzgerald, you testified that there were certain movements in the price of Port Authority bonds from sometime around repeal down to date. Is that correct? A. That is correct.

Excerpts from Testimony of Austin F. Fitzgerald

Q. Relative to other bonds and the Port's themselves. Would it be accurate to say that some portion of the change in the prices of Port Authority bonds during this period was attributable to a technical situation? A. From the repeal to the present time?

Q. That is right. A. In my opinion that would probably be true.

[735] Q. A short-term technical situation? A. To answer in terms of short-term is a—

The Court: You want to know what he means by short-term?

The Witness: That would be helpful.

The Court: Is that a term used in the security industry and municipal bond industry, a short-term technical situation?

The Witness: Yes.

Q. Okay. What does it mean? A. Okay. Basically when people refer to short-term, they mean over a period of time which they will anticipate will be two, three days, a week, two weeks, three weeks.

Q. Three weeks? A. But it could—this is what I was going to say in terms of this: When you get into the idea of short-term technical there are times when short-term technical situations can last for a longer period of time, and you could have—short-term, there is no definite period of time when people will pick to say, that's short-term when they do things such as this, you know.

Q. But normally it would be from anywhere from two to three days to three weeks? [736] A. Well, it could last for two months.

Q. Could it last for nine months? A. No.

Excerpts from Testimony of Austin F. Fitzgerald

The Court: In the bond market that would be a long-term phenomenon, nine months, if something happened it would be considered long-term?

The Witness: In the trading aspect of it, your Honor. It obviously wouldn't be in terms of an investment approach. T 734-3 to 736-11.

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[737] Q. So the price decline about which you [738] were speaking is roughly from May, early May, mid May, late May [1974]? Can you be more precise? A. It's pretty hard to be.

Q. All right. Sometime in May until the first week of February [1975].

Now, during that period, put it this way, did anything occur during that period other than repeal of the covenant that might, in your opinion, have affected the price of Port Authority bonds? A. Nothing as it would be say opposed to you know, the general market area, in other words, the general level of interest rates.

Q. Because a general decline would have affected the prices, repeal would have affected the prices, what else, if anything, can you think of that would have affected the prices? A. Offhand, I—you know, in terms of specifics, I can't really think of anything.

Q. Are you familiar with the basic financial condition of the Port Authority insofar as publicly reported? A. Yes, although I couldn't claim to be an analyst, or anything in that respect.

Q. Are you aware of anything that has [739] happened, any reports of its financial condition that came out during the period between May and the present that might have affected the price of Ports? A. In what sense?

Excerpts from Testimony of Austin F. Fitzgerald

Q. Well, do you recall seeing the [reports] of the World Trade Center being in difficulty? A. I may have in terms of that, but in terms of that, people have been aware for some time.

Q. That the World Trade Center is in difficulty? A. No, I wouldn't use the word "difficulty," but in terms of the fact that they are attempting to rent their space. Office building rental space in New York isn't what it used to be.

[740] Q. Has that market gotten better or worse in the last seven or eight months? A. Gee, there, again, frankly, I couldn't tell you the answer to that. I don't know. T 737-25 to 740-5.

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Q. That [S-1] is a *Wall Street Journal* story, you see that came out during the month of August. Could that have an effect on bondholder enthusiasm in Ports? A. Do you mind if I finish reading it?

Q. No, not at all.

Do you think, Mr. Fitzgerald, that that might have had an effect on bondholder acceptance of Ports? A. I don't believe that it would have in terms of this article.

Q. And that is because you think—well, why do you think that? A. All right. I believe that it was known by [741] people at that time that this was approximately the level of the rental of space in the World Trade Center.

Q. Have you seen this story before? A. I don't believe that I have seen this specific one.

Q. Counsel provided us with some documents.

Were they your personal documents or the firm's documents? A. They were the firm's documents, yes.

Q. There may be material in that file that you have not seen? A. That's quite possible.

Excerpts from Testimony of Austin F. Fitzgerald

Q. I want you to show you now an Exhibit marked as S-2 from the *New York Times*—I am sorry, November 10, 1974, and I can now tell your Honor that it was on the front page of that [edition] of the TIMES headed, "Port Authority has fallen on hard times" T 740-13 to 741-21.

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[742] Q. I would ask the witness to examine, as well, P-89, and the question—and please feel free to take as much time as you need, Mr. Fitzgerald, do you think the *New York Times* story, S-2, in evidence, had an effect on the price of Port Authority bonds? A. May I finish reading it before I answer the question?

Q. Yes.

Now, you have read S-2. Have you had a chance to look at P-89? A. Yes.

Q. The question is do you think the Sunday [743] *Times* story of November 10, 1974, may have had an impact on the price of Port Authority bonds? A. In my opinion, it would not have had an impact to that great a degree, this story.

The Court: Keep your voice up.

The Witness: No, I don't believe it would have had an impact to that great a degree. I believe that most people who were owners of bonds would have probably have known in terms of the facts that are contained in this story. • • •

[By Mr. Sovern]: . . . Some Bondholders would not, though. Is that correct?

The Witness: It's possible. T 742-13 to 743-24.

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[744] Q. As you look at P-89 and you see a price of Port bonds dropping like a shot right after this story appeared in the Sunday *Times*, can you explain that drop by any other event? A. I would, to my mind, the way I would characterize it in terms of this, is that it is a continuation

of what had been going on before. In other words, I could not say that it would be due to the story in the *Times*, as well as it would be due to the earlier decline that took place prior to this story.

Q. So you think that the drop in the chart reflected immediately after November 10 is just a delayed reaction to the repeal? A. I wouldn't—I don't believe that the true answer can come out in that manner in the sense that if you have a negative reaction to news, this will take place, but the length of time that it will take it to take place, no one can really tell that, it will be an ongoing thing.

Q. Did you notice any pattern on selling immediately after the repeal? Was there heavy selling? [745] A. There was a reasonable amount of selling, but once again, to explain this, you are not dealing with an auctionable market. You are dealing with a market where people are bidding and asking for their own account and therefore you would have to, to have had the selling, you would have to have people who are willing to stand up and buy bonds as well as the sellers, and the market has been characterized by the fact that it is a thin market, as we have indicated.

[746] Q. Has it always been thin? A. What?

Q. Has the market in Ports always been thin? A. No.

Q. When did it become thin? A. You could say probably it started last April, May.

Q. And it has remained thin ever since? A. Relative to what it had been prior to that.

Q. You said that you had heard of the covenant and it was generally considered as security for bondholders in that it prevented the diversion of Port Authority earnings to mass rail transit. Is that correct? A. That is correct.

Q. Are you familiar with the terms of the covenant? A. In a general manner.

Q. Do you advise people about its meaning? A. No. We are not in the advisory business.

Q. How long have you known that it covered rail transit? A. Since 1962.

Q. Did you read it at that time? A. As a covenant in terms of reading through the [747] entire thing? I glanced at it in terms of that.

Q. Have you discussed your testimony in this case with anyone? A. Yes.

Q. With whom? A. With the counsel for the United States Trust.

Q. I think you have testified you committed less capital to Ports when you became aware of the possibility of repeal. We have referred to that before. Are your inventories in municipals of all kinds? Heavier or lighter today than they were in 1973? A. You will have to give me time to think back and reflect a little on this.

Q. Please. If the date is troublesome, take it back to 1972.

Let me make it easier for you. At least I will try to make it easier. Have your inventories become lighter generally lately? A. I could be facetious either way about that.

Q. Answer whichever question you find you want to do.

Mr. Landis: Maybe he can t find either.

A. In general I would say they would be probably lower, but not to a great degree. In other words—

Q. Generally lower, then, is your answer. [748] A. Yes, that is in this specific area.

Q. Municipal bonds. A. Municipal dollar bonds.

Q. Municipal dollar bonds. A. Yes. T 744-4 to 748-5.

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[752] Q. Are municipal bonds regarded as secure investments, Grade A? A. Most of them are.

Excerpts from Testimony of Austin F. Fitzgerald

Q. So that a high quality municipal bond has advantages of both the tax-free yield and high security. Is that right? A. Would you repeat the question, please?

Q. A high-grade municipal bond has the advantages both of a tax-free yield and high security. A. Yes. T 752-11 to 752-20.

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Excerpts from Testimony of Gordon Fowler

[761] GORDON BLACKFORD FOWLER, 21 Cliffmore Road, West Hartford, Connecticut, sworn.

Direct Examination By Mr. Landis:

Q. By whom are you employed, Mr. Fowler? A. I am an employee of the Connecticut General Life Insurance Company located in Bloomfield, Connecticut.

Q. What is your capacity? A. I am a secretary in the bond department, responsible for public debt investments.

Q. And what is your educational background commencing with your college education? A. I have an A.B. Degree from Princeton University and an M.S. degree from Columbia University School of Business.

Q. In what areas of study? A. Business administration and in economics at Princeton.

Q. Where have you employed since your education? A. Following Columbia, I went to work for Connecticut Mutual Life Insurance Company in [762] Hartford, Connecticut, in a non-investment capacity.

The following year, I changed employment and went to work for Aetna Insurance Company, located at 55 Elm Street in Hartford.

In 1962, Aetna was acquired by the Connecticut General Life Insurance Company and in 1964, the Aetna's investment department was merged into that of Connecticut General's.

At that time, I came on the payroll of Connecticut General Life Insurance Company and I worked there ever since.

Q. What did you do at Aetna and since Aetna was merged into Connecticut General at Connecticut General. A. While I was at Aetna I was in municipal bonds, as

an analyst, and on joining Connecticut General, I became a senior analyst responsible for municipal bonds.

Q. When you say municipal bonds, what did that entail? A. Well, that at the time involved reviewing new bond issues and making recommendations for purchases and sale of such securities.

Subsequently, I became an officer of [763] Connecticut General in 1968. At that time, I became responsible for making the decisions and executing purchases and sales of those bonds.

Q. When did you attain your present capacity? A. In 1972, I became a secretary of the corporation.

Q. What are your responsibilities in that capacity? A. I am responsible for public fixed-income securities. This includes corporate bonds, municipal bonds, U.S. governments and its agencies; the total amount would be about a billion one, under my supervision, of which 500 million are municipals—500 million are corporates and 100 million governments.

Q. Does Connecticut General or Aetna presently own any Port Authority bonds? A. Yes, we do.

Q. When were those purchases made? A. The initial purchases of bonds we hold now were made in 1968.

At that time, we purchased 875,000. Each year since then to 1973, we added to those holdings and at the end of 1973 we held a total in all [764] companies of $9,450,000.

Q. Were those purchases made in the secondary market or upon original issue? A. With the exception of 3 million 40th series bonds, substantially all were made in the secondary market.

Q. In your purchases between 1968 and 1973 in the secondary market, were you aware of the existence of the 1962 covenant? A. Yes, I was.

Q. Did the existence of the covenant affect your decision to purchase those bonds? A. I relied on it at the time I purchased the bonds, yes.

Q. Now, with respect to the 1973 purchase of bonds, did you purchase those bonds with knowledge of the 1973 prospective repeal of the 1962 covenant? A. Yes, I did.

Q. Would you explain that decision? A. Well, the 40th series bonds which we purchased were not covered by the covenant. However, of approximately a billion seven, thereabouts, of outstanding Port Authority bonds, were protected by the covenant and it to me was [765] unreasonable to expect that these bonds would be fully retired in the immediate future or even the forseeable future and therefore the 40th series bonds were indirectly protected by the covenant.

Q. With respect to all the purchases you described, would you have purchased any of those bonds without the protection of the covenant? A. I can't say for certain we would not have purchased them, but if we had, it would have been at a much lower price for the given coupons.

Q. Since the 1974 repeal of the covenant, have you purchased any other Port Authority bonds? A. No, we have not.

Q. Did you take action with regard to the bonds that you held? A. We sold two million of our 40th series bonds at cost in the first part of 1974.

Q. Why did you decide to sell these bonds at that time? A. The likelihood of the repeal being effective—not being effective, but occuring, was of concern to us.

Q. What would that entail in regard to those bonds? [766] A. Well, we were concerned with respect to our entire holdings, that if the repeal were effective, that the earnings of the Authority will be diluted by additional passenger rail facilities.

Excerpts from Testimony of Gordon Fowler

Q. Did you try to sell any other bonds of the Port Authority at or since that time? A. No, we have not. We have principally tried to sell those 40th series bonds. Had we had an opportunity to sell bonds without incurring a substantial loss, we would have been favorably inclined to do so, however.

Q. Did you try to sell the bonds of the 40th series, that you still hold? A. Yes, we did. We tried to sell the remaining one million.

Q. I gather you were not able to? A. No, we were not.

Q. Why was that? A. The price of the bonds had deteriorated to such a low level that we were unwilling to take the loss if we were required to sell them.

Q. I gather then you continue to hold substantial amounts of Port Authority bonds. A. That's correct, we still hold $7,450,000 [767] worth.

Q. What is the reason, justification, for continuing to hold those bonds, if there is one? A. Well, we are optimistic, but the repeal will not be substantiated or the Court will not allow the repeal to become effective and we are unwilling at this time to take the loss if we were required to sell the bonds.

Q. Since the 1974 repeal of the covenant, have you purchased any moral obligation bonds? In the State of New York, or New Jersey and their agencies or subdivisions? A. No, we have not.

Q. What is the reason for that? A. It is the general feeling that if the Legislature of the two states would renege on their obligations with respect to the Port Authority covenant, we have no reason to believe that they would live up to the moral obligation, which is not a legal obligation. T 761-3 to 767-22.

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Excerpts from Testimony of Gordon Fowler

[769] Cross-Examination by Mr. Laulicht

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Q. Now, as I read S-26, in 1971, Aetna purchased a net total of $2,150,000 worth of Port Authority bonds. Is that correct? A. No, let's see—we held—you are talking about 1971?

Q. Yes. A. We owned a million eight at the beginning of the year and we had two million nine—okay, two million nine hundred fifty. The difference there is two million one hundred fifty thousand.

Q. Now, in making your decisions—and I take it you were responsible for the decision to buy that $2 million worth? A. That's correct.

Q. In making those decisions, did you rely on research reports that were in the files of Connecticut General? A. We principally relied on the official statements. We do get various research reports and the time—I [770] don't have a specific recollection of relying on it directly.

Q. Well, if a research report comes in from Hornblower and Weeks, that would come in to your office would it not, Mr. Fowler? A. Yes, it would.

Q. Would you normally read it? A. Generally, yes.

Mr. Laulicht: I would like to offer as S-27, a document which has been marked originally as P-102. I take it this comes from the files of Connecticut General. It does come from the files of Connecticut General, according to Plaintiff's Counsel.

Is that the type of report.

Mr. Landis: I object to it.

The Court: Let him ask the question first.

Q. Is that the type of report that would come to your office? A. Yes, it would come either to myself or my associate who works with me on municipals. T 769-7 to 770-22.

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Excerpts from Testimony of Gordon Fowler

[775] Q. Did you or have you read Dun & Bradstreet Reports about the Port Authority? A. Pretty much as in the same fashion as this Hornblower Report. I have looked at them from time to time, but have no specific recollection of any given report.

Q. Mr. Fowler, in making your decisions with respect to what bonds to buy, do you rely on anything other than the official statements relating to those bonds? A. We principally rely on those.

[776] Q. Yes, and what else do you rely on? A. Well, obviously to the extent those reports are available we look at them at the time.

Q. Anything else? A. Well, I would say those are the major things.

The Court: You have an astrologer, or something?

The Witness: No.

There is, of course—there is the oral-type communication an investment banker might convey.

Q. Do you know anything about the rating system that Dun & Bradstreet used to employ? A. Not a whole lot, no.

[777] Q. Do you know what a rating of 0-7 would have meant for Dun & Bradstreet in February of 1972? A. My recollection was that that was a fairly respectable rating, but until Dun & Bradstreet took over Moody's, I really have not relied on Dun & Bradstreet type ratings. Even now I don't rely on Moody ratings.

The Court: How about S & P?

The Witness: S & P, I don't rely on them. We do our own analysis, but I would possibly give S & P a slightly better score at this point.

Excerpts from Testimony of Gordon Fowler

The Court: But you rely principally upon your own analytical work?

The Witness: That's correct.

The Court: In making your investment decisions?

The Witness: That's correct.

The Court: Plus such information you get from members of the investment banking community in whom you have confidence?

The Witness: That's right.

By Mr. Laulicht:

Q. Now, in light of your statement that [778] you just made that you don't rely on Moody's, but you could rely on Standard & Poor's— A. I'm sorry but I didn't say that.

The Court: He didn't say that. He just said he would give S & P a better rating than Moody's. That's all.

Q. I'm sorry for misstating it, but in light of what you just said can you explain to me how it is that you have at least two Moody's reports with respect to the 40th and 41st series according to the exhibit list, and you don't have a Standard & Poor's report. A. That's because we subscribe to a service put out by Moody's Investors Service, and I'm unaware of any similar service at Dun & Bradstreet.

Q. Well, Dun & Bradstreet is not my question. My question relates to Standard & Poor's. A. I don't mean Dun & Bradstreet, I mean Standard & Poor's. They were originally Dun & Brad. T 775-15 to 778-21.

• • •

[779] Q. Did you ever see S-29? A. Yes, it looks similar to one that's in our files.

Excerpts from Testimony of Gordon Fowler

Mr. Laulicht: May I offer it now, [780] your Honor.

The Court: All right. • • • S-29 in evidence. T779-23 to 780-6.

• • •

[782] Q. Now, at the time you decided to buy $1 million worth of Port Authority bonds in 1972 were you aware of the summary statement as it is so-called at the bottom of the first page of S-29? A. To the extent we had this report in our file, I suppose you could say that. Again, I don't remember specifically having read this prior to making that purchase.

Q. In February 1972 did you have any idea people were trying to push the Port Authority into mass transit. A. Yes.

[783] Q. And that is when you bought the bonds after having that knowledge. A. We had knowledge that there was activity in that direction, yes. T 782-14 to 783-4.

• • •

[784] The Court: Did you know prior to the time that you made the purchase of $1 million in 1972, that the State of New York had adopted legislation containing a total repeal of the covenant which would not become effective until New Jersey had adopted similar legislation?

The Witness: At the time of purchase? I am quite confident at that time I was aware of this. I was aware of the action on the part of the New York State Legislature and Governor Rockefeller's trying to get it passed. Whether or not it was before or after the purchase, or when the purchase took place; let me put it this way: I am not exactly sure. I don't have that information with me.

Excerpts from Testimony of Gordon Fowler

Q. [By Mr. Laulicht] At any rate, if you did buy the bonds before that total repeal by New York in 1972, I take it from S-26 you did not go out and sell $1 million worth of bonds or whatever you were holding at that time. A. That is correct.

Q. Can you explain that to me? Why didn't you sell your bonds at that time? A. At that time I did not think it was likely that the total repeal would be adopted by both states.

Q. What did you base that opinion on? [785] A. That the Governor of New York was anxious to get this done and that the New York State Legislature would go along with him was a reasonable prospect but that the previous governor of the State of New Jersey I did not think or possibly the Legislature would act or would not necessarily go along with this.

Q. Did you have any information between June of 1972 when the New York repeal was passed and November 1972 when the bi-state governors' agreement was announced with respect to what the position of New Jersey would be on the total repeal? A. I can't say at the time; the period is too short.

Q. Were you aware, Mr. Fowler, in 1972 that there was litigation relating to the covenant upon which you say you relied? A. Are you referring to litigation brought by Mr. Kheel?

Q. Yes. A. Or the firm that he was associated with?

Q. Yes. Were you aware of it at that time? A. I was aware that there was such litigation. The exact timing I can't say for certain.

Mr. Laulicht: I would like to mark S-30, the document that had been originally marked P-106.

Excerpts from Testimony of Gordon Fowler

Q. Do you remember whether you saw S-30, [786] Mr. Fowler? A. It looks similar to the report that we have in the file.

Q. Would you take a look at Page 9? Would you specifically refer to the next to the last paragraph about pending litigation concerning the covenant on which you say you relied? A. Beginning in early 1971?

Q. Yes. A. Yes.

Q. Does that paragraph refresh your recollection that you knew in or about February 1972 about the litigation challenging the constitutionality of the covenant upon which you say you relied in buying Port Authority bonds? A. You mean do I know that there was such a suit?

Q. No. Does it refresh your recollection at all that you probably knew about the lawsuit in February 1972? A. Probably, yes, sir.

Q. Is it likely that you bought that whole million dollar's worth of 38th series before February 1972 or the million dollar's worth of Port Authority bonds—let me withdraw the question and ask you whether it is likely that you had knowledge of the Kheel lawsuit [787] challenging the constitutionality of the covenant before you bought $1 million worth of Port Authority bonds in 1972? A. Yes. As I say, I don't know when in 1972 we bought them. But it is likely that I had a knowledge of it. T 784-1 to 787-6.

• • •

Q. Now, as I read S-26 and as I understood your testimony in 1973 Connecticut General bought $3 million worth of the 40th series of consolidated bonds; is that correct? A. That is correct.

Excerpts from Testimony of Gordon Fowler

Q. That would be after the date of issuance of those bonds which I believe was somewhere around June 20, 1973. A. I think it was on the day the bonds were marketed that we bought them directly as part of the new issue.

Q. It would have been somewhere around June 1973, I think I could represent that that is when this issue was marketed. A. Yes.

[788] Q. It is also true that in 1973 Aetna bought $2 million worth of 33rd series. A. That is correct.

Q. This was done at the time you were aware of the Kheel lawsuit, is that correct? A. Yes.

Q. Were you also aware that a gentleman named Brendan Byrne was running for governor in 1973? A. Yes.

Q. Were you aware prior to June 1973 when you bought $3 million of 40th series that Mr. Byrne who was then running for governor had issued a press release in which he said: We must reopen the fight to pledge surplus Port Authority revenues to essential transit projects, something Governor Cahill has refused to do. T 787-12 to 788-16.

• • •

[789] A. I became aware of Governor Byrne's position, but whether it was at that time or later time—I was aware of it after his election to office, I'm sure of that, but not necessarily prior to that point in time. I did not follow his campaign that closely.

Q. Were you aware in 1973 of Governor Rockefeller's position with respect to the repeal of the covenant? A. Yes, I was.

Q. What was Governor Rockefeller's position? A. He was anxious to have it repealed.

Q. How soon after Governor Byrne was elected and was now governor did you become aware of his position on the repeal? • • •

Excerpts from Testimony of Gordon Fowler

A. It was sometime prior to our sale of 40th series bonds, because it became evident that New York State was in favor of repeal, and that now with the new governor it was more likely that the New Jersey Legislature and the governor would go along with it.

Q. When did you make that sale of the consolidated bonds in 1974? A. In March.

Q. At that time did you try to dispose of [790] your other holdings? A. No. I just tried to get rid of the three million of the 40th series.

Q. Even though you thought that they were protected by the covenant as you testified? A. That is right.

Q. Can you explain that? A. Well, obviously they are not protected directly. They are only protected indirectly.

Q. And so? A. And so I was concerned based on the actions taken by the two legislatures that it might be possible to devise some sort of means to shelter the bonds that were subject to the covenant to the detriment of those that were not.

[791] Q. Were you concerned that something might be done to the covenant itself in early 1974? A. Yes, I was concerned, but the two legislatures and the governors would be successful in having it repealed.

Mr. Laulicht: We will mark as S-31 a document that had been previously marked P-112 and is a Moody's Credit Report dated June 14, 1973.

Q. Mr. Fowler, do you recall reading S-31 before you bought the $3 million worth of consolidated bonds of the Port Authority discussed in this report? A. I most likely did.

Excerpts from Testimony of Gordon Fowler

Q. Do you think it is likely you would have invested $3 million of Connecticut General's money without reading a report like this? A. I would have read the official statement. And I would prefer to put emphasis on that rather than on these credit reports.

Q. Were you aware when you put down $3 million that there was a discussion of the Port Authority putting up between $250 and $300 million of its own money on railroad mass transportation projects? A. I was aware that there were projects being discussed that would cost that much, yes.

[792] Q. Do you recall if some of the discussion at that time was to the effect that this would be done on a self-supporting basis? A. Yes.

Q. Do you recall that the reason for saying that it would be done on a self-supporting basis would be so that it would comply with the covenant? A. I believe that was correct.

Q. And in fact if the projects involving 250 or $300 million worth of Port Authority money was certified as self-supporting over the next ten years it would comply with the covenant, would it not? A. I believe it would.

Q. Before you bought $3 million worth of 40th series bonds that were indirectly protected, as you say, by the covenant, didn't you think that there was any way in which a Port Authority investment of $250 million in rail transportation projects could be made self-supporting? A. Did I think that there was any way that it could be made self-supporting?

Q. Yes. A. With a subsidy.

Q. What kind of subsidy? A. From the State of New York or New Jersey.

[793] Q. And that is what you thought would happen? A. I thought that there would be a combination of federal, state and local subsidies in one form or another.

Excerpts from Testimony of Gordon Fowler

Q. That is correct. That was part of the $650 million program, is that right, that was discussed at that time? Do you remember that? A. I do not remember that specific number.

Q. Do you have any idea of the debt service on $250 million worth of Port Authority bonds? A. Assuming 30-year bonds?

Q. Yes. What is the annual debt service? A. About an 8 percent constant at that point.

Q. So that it would be roughly 20 to $25 million a year? A. Yes.

Q. And you thought that is what the state and federal government would subsidize? A. If they wanted the Port Authority to get involved in it.

Q. Were you concerned that there might be a way or that there might be an effort to find a way to avoid that kind of commitment? A. Well, the fact that people were trying to repeal the covenant was indicative of the fact that there was something, either that project or some other projects [794] might be in the winds.

Q. And yet you went ahead and bought $3 million of the bonds discussed in S-31. A. Certainly. The covenant protected us.

Q. What does the covenant protect you from, Mr. Fowler? A. It protects us from the Port Authority incurring additional rail passenger transit deficits.

Q. Unless they are certified. A. They can't certify a deficit, to my knowledge.

Q. Yes, but it is possible to certify an operation as self-supporting, is it not, even though it may run a deficit? Or do you feel that there was no way that that would happen?

Excerpts from Testimony of Gordon Fowler

A. Do you mean that the Authority would in this manner certify something as being operated on a profitable or self-sustaining basis, not that it would be operated at a deficit?

Q. That is correct. A. We have to put some reliance—we put a good deal of reliance on the good faith.

Q. Of the Port Authority? A. Of the Port Authority.

Q. That is one of the reasons why you now have $7½ million worth of their bonds, that you have [795] some faith and reliance in the Port Authority. A. In being honest people, yes. T 789-1 to 795-2.

• • •

[799] Q. You say you attempted to sell more of the 40th issue but were unable to do so? A. We sold two million out of our three million and we tried to sell the remaining million.

Q. You were unable to do so? A. We were unable to do so without taking a loss.

Q. What price did you sell the two million you did sell at? A. Par.

Q. When was that ? A. In March of 1974.

Q. Tell us what particular provision in the covenant you relied on? A. Well, my general understanding of the covenant is, what is in the official statement, and part of it that is most important to me is that the mass rail [800] deficit is limited as to future projects. T 799-10 to 800-1.

Excerpts from Testimony of Gordon Fowler

• • •

Q. Are you familiar with the Consolidated Bond Resolution of October 9, 1962 of the Port Authority? A. I have read it and have an understanding of sorts of it, yes, sir.

Q How about the series resolutions [801] establishing particular issues of Port Authority Bonds? Are you familiar with those resolutions? A. Not all of them, no.

Q. Are you familiar with those of the 40th series?

A. Yes, I have read it. T 800-21 to 801-5.

• • •

Excerpts from Transcript of Hearing, February 11, 1975

[823] Mr. Sovern: Yes. I am reading from the New York Times dated February 11, 1975, which reports the bid and asked prices of the two bonds as they were yesterday.

The Port 6 was bid 87 and the Mass Port 6 was bid 89. T 823-7 to 823-12.

• • •

[840] Mr. Sovern: We turn now to the [841] Armstrong deposition transcript, your Honor. And we propose to offer a few limited extracts from the transcripts along with some exhibits.

It is our purpose, first, to offer from Volume I—

Mr. Landis: Your Honor, if I may interrupt at this point, I think I may save a lot of time, because I think under the rule that we are entitled to have the entire deposition marked in if they propose to offer excerpts from it. Then I would—

The Court: Oh, no, that is not the rule. That is not what the rule is.

Mr. Landis: I read any party may offer any other parts in the rule.

The Court: Yes, such as—

Mr. Landis: Rule 4:16-1(d).

Mr. Sovern: I am sure your Honor knows that that is not the practice under that rule with respect to the deposition of a witness.

Mr. Landis: Well, the only case that we were able to find indicates that it is the practice.

[842] The Court: Rule 4:15?

Mr. Landis: 4:16-1, your Honor, and it is part (d). It is the last phrase that I am talking about.

The Court: Well, you don't get to offer the whole deposition.

Excerpts from Transcript of Hearing, February 11, 1975

Mr. Landis: I believe any other parts means the whole.

The Court: No, you introduce any other part which ought, in fairness, to be considered with the part introduced.

Mr. Landis: I am not talking about that phrase, your Honor. I am talking about the last phrase, your Honor, I am talking about the last phrase, any part in the offer.

Mr. Sovern: That is intended to be modified by the passage that the Judge just read.

Mr. Meyner: It is not.

Mr. Landis: I don't think so at all. I have a case that I can read—

The Court: Well, I am telling you that this been the practice, that a party offering his adversary his party's deposition [843] is not subject to having the whole of the deposition introduced, only so much as is necessary to make it fair and make sense or the meaning in which the portion is introduced clear. T 840-25 to 843-6.

• • •

[850] Mr. Sovern: I would like next, your Honor, to read into the record a paragraph from a letter of January 24, 1975, from Mark K. Sisitsky to Murray Laulicht. I am reading from paragraph 6 at page 2 of that letter.

The Trust Company holds in discretionary account $2,570,000 par value of series 40 and $385,000 par value of series 41. T 850-13 to 850-21.

Letterhead of

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION

[SEAL]

GEORGE B. GELMAN
JUDGE

COURT HOUSE
HACKENSACK, NEW JERSEY 07601

March 10, 1975

Robert Meyner, Esq.
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Re: United States Trust Company v.
State of New Jersey—Docket No.
L-26861-73

Gentlemen:

I have read all of the communications with respect to defendant's offer of the Armstrong deposition and exhibits, and plaintiff's counter offer of excerpts from the Armstrong deposition and exhibit, as well as the proposed orders that were submitted by each side. I have also read the cases which have been cited by both sides. Finally, I have also read all of the proffered excerpts from the Armstrong

deposition and have reviewed the exhibits which both sides wish to offer.

I have come to the conclusion that the defendant should be permitted to withdraw its offer of excerpts from the Armstrong deposition and the exhibits associated therewith, and counsel for the defendant may submit an order to that effect.

Having read the materials I am satisfied that neither the offer made by the defendants or that of the plaintiff adds anything of significance to the record in this case. Further, much of the material which the plaintiff wishes to offer will be subject to objections based upon the rules of evidence.

I will ask Mr. Laulicht to submit an order under the five-day rule.

Yours very truly,

GEORGE B. GELMAN
George B. Gelman, J.S.C.

GBG:jm
cc: Dean Michael I. Sovern
Carter, Ledyard & Milburn, Esqs.

Addition to Appendix by Stipulation

[The following was added to the Appendix by Stipulation Among Counsel dated August 4, 1976]

On July 8, 1976 the Port Authority issued and sold $100 million principal amount Consolidated Bonds Forty-second Series, due 2011 (first installment). This was the Port Authority's first long-term financing since the 1974 repeal of the 1962 Covenant. The interest rate on the issue was 8.20%; the underwriting syndicate which purchased and resold the issue bid 98 ($980 per $1,000 principal amount), resulting in a net interest cost to the Port Authority of 8.27%. The issue was rated "A" by both Moody's and Standard & Poor's.

On Friday, July 9, 1976 *The Wall Street Journal* contained the following report with respect to the issue:

> About $166 million of new tax-exempt revenue bonds were marketed by two agencies, including $100 million by the *Port Authority of New York and New Jersey* and about $66 million by the *Rhode Island Housing and Mortgage Finance Corp.* The Port Authority's bonds were entirely sold and just $4 million remained available from the Rhode Island unit's issue, which was priced to yield between 4.5% in 1977 and 6.6% in 1988.
>
> An 8.2% tax-free return was provided by the Port Authority's new 35-year bonds, the same as a taxable gain of almost 15% for single persons earning about $26,000 or families making about $36,000. The single-A-rated securities were sold primarily to individuals and small institutions.
>
> "Large buyers have refused to touch the authority's bonds ever since the New York and New Jersey legislatures several years ago repealed the 1962 covenant and thereby weakened the protection afforded to bondholders,' a dealer remarked. 'Also, of course, any issue from New York has been extremely difficult to sell because of the well-publicized fiscal problems here," he added.

Addition to Appendix by Stipulation

According to a tombstone announcement in the July 12, 1976 issue of *The New York Times,* the 42nd series was offered through a syndicate headed by Bache Halsey Stuart Inc. Among the investment firms listed as participating in the syndication and offering were: Dillon, Read Municipals; Kidder, Peabody & Co.; Hornblower & Weeks-Hemphill, Noyes; Loeb, Rhoades & Co.; Blyth Eastman Dillon & Co.; Shearson Hayden Stone Inc.; E. F. Hutton & Company Inc.; L. F. Rothschild & Co.; Salomon Brothers; Merrill, Lynch, Pierce, Fenner & Smith; The First Boston Corporation; White, Weld & Co.; and Weeden & Co. The announcement referred to the interest rate, the A rating by Moody's and Standard & Poor's and the offering price of par and accrued interest.

The New York Times reported as follows on July 13, 1976:

> Prices also showed gains in the tax-exempt sector. At one point yesterday the new 8.2 percent revenue bonds marketed last week at par by the Port Authority of New York and New Jersey were being quoted at 101⅛ bid and 101⅜ asked.

Standard & Poor's "Fixed Income Investor" did not contain a full report with respect to the Forty-second Series. It continued the Port Authority's A rating and reported:

> "Municipal Prices Improve
>
> "The municipal market last week continued to follow the tone set in recent weeks, quiet and firm. The $100 million Port Authority of New York and New Jersey bonds highlighted the week's new issue activity. Coming to the market for the first time since 1973, the issue attracted considerable investor interest. There was little follow-through activity in open accounts. Prices showed modest advances in the secondary market although trading was light."

Addition to Appendix by Stipulation

Moody's Investors Service, Inc. issued a municipal credit report dated July 2, 1976 regarding the Forty-second Series which said in part:

> "Port Authority of New York and New Jersey, July 2, 1976 RC, Rating: Consolidated Bonds and Notes: A Offering: $100,000,000 Consolidated Bonds, Forty-second Series, for sale on 7-8-76, Dated: 7-15-76, Due: 7-15-2001, Call: beginning 7-15-86, L.O.: Patrick J. Falvey, Authority General Counsel; Hawkins, Delafield & Wood, New York City. *Type enterprise:* bi-state agency of New York and New Jersey which operates air terminals, toll bridges and tunnels, marine facilities, World Trade Center, PATH rail transit system, other facilities including bus stations, truck terminals, heliports. *Pledged revenues:* direct and general obligations of the Authority secured equally and ratably with all other Consolidated Bonds and Notes by a pledge of the net revenues of the existing facilities of the Authority, the General Reserve Fund of the Authority, and the Consolidated Bond Reserve Fund of the Authority. *Purpose:* capital expenditures in connection with Authority bridges and tunnels; docks and wharves; airport terminal and service buildings, roadways, runways, taxiways and fuel and utility service and distribution systems; bus terminals, the Hudson Tubes portion of the PATH system; parking facilities; storage or training facilities directly related to any of these; and the World Trade Center; and for refunding all or any part of $50,000,000 Consolidated Notes, Series BB, issued in 1975; provided, that no more than 10% of the amount of the proceeds not expended to refund any Series BB Consolidated Notes shall be used for the purpose of capital expenditures in connection with the World Trade Center and those integral portions of an extension to the Port Authority Bus Terminal related to any further construction above the extension. • • •

Addition to Appendix by Stipulation

The New Jersey Supreme Court in a February 1976 decision upheld the Superior Court in the May 1975 decision that upheld the New Jersey legislation that repealed the 1962 covenant restricting Authority involvement in deficit mass transit operations. This 1976 decision has been appealed to the United States Supreme Court which recently announced that it will hear this case at its next term. These court decisions are a matter of deep concern to bondholders generally. The effect on the Authority cannot be determined at this time in the absence of a definite plan for financing mass transit projects and facilities deemed to be non-selfsupporting. In the meantime, earnings of the present facilities are good, and reserves for debt service continue strong. • • •

Expansion Program: (1) in August 1975, the Authority authorized a major rehabilitation program of the upper level roadway of the George Washington Bridge and improvements to the New York and New Jersey approach highways at an estimated $37,000,000 construction cost; (2) Bus Terminal is being extended in an area north of the present Terminal, Lincoln Tunnel approaches are being extended, and air rights above the extension would be used as an office building built and operated by private parties. Extension and Tunnel approaches including land costs, but not air rights development, are expected to involve a capital investment of $160,000,000; (3) planned rehabilitation of PATH including modernization and development of Journal Square terminal area, is estimated to require further Authority investment of about $59,000,000; (4) under construction and scheduled for completion by the end of 1976 is a multi-level parking area at La Guardia Airport at estimated $41,751,000 expenditure (5) Authority capital expenditures for a new interchange and roadway system linking the New Jersey Turnpike directly with Newark International Air-

Addition to Appendix by Stipulation

port and Elizabeth-Newark Marine Terminal would be 50% of the estimated $50,000,000 cost, with the State and Turnpike Authority funding the balance; (6) $19,000,000 is estimated as cost to build distribution buildings and pave open areas on 95 acres of undeveloped land adjoining Port Newark; (7) $12,000,000 budgeted for 1976 for continued development of Jersey Central property at Elizabeth Marine Terminal and construction of specialized container facilities; (8) present estimated are that an additional investment of $120,000,000 will be needed to complete the World Trade Center. • • •

The legislatures in the 1971-74 period enacted laws providing for the regional development of mass transportation access to Kennedy International and Newark International. The legislation also authorizes the Authority to undertake as Hudson Tubes extensions passenger rail facilities extending from Penn Station in Newark over rail transit lines to Plainfield including a connection to provide improved access to Newark International. In October 1974 a joint task force of the New Jersey Department of Transportation and the Authority was established at the request of Urban Mass Transportation Administration (UMTA) of the U.S. Department of Transportation to study potential transit alternatives in the Newark-Plainfield corridor. The task force submitted its interim report on 1-15-75 to Governor Byrne, and the report assessed in detail recommendation 5 transit alternatives in the Union County corridor as well as transit access to Newark International. A final report was submitted to UMTA on 2-10-75.

The 1971-74 legislation also authorizes the Authority to undertake certain improvements to passenger rail line connecting with the Hudson Tubes to provide direct rail service into Penn Station in New York City by the Erie-Lackawanna and to upgrade

existing Penn Central rail service into Penn Station in New York City. The legislation adopted in 1974 also provided for the repeal of the statutory covenant between the two states and affected bondholders limiting the Authority's ability to participate in deficit passenger rail projects.

The Authority in May 1975 filed an application with UMTA for $277,600,000 to pay part of the cost of extending PATH to Plainfield. Local contribution totals $69,400,000 to be funded by the Authority from proceeds of future bond issues. It is contemplated that PATH would enter into an agreement with New Jersey under which PATH would acquire the properties out of Authority bond issues and UMTA grants and lease the property to the State. The amount of rent to be paid by the State would depend mainly on the outcome of the litigation relating to repeal of the statutory covenant. On 12-19-75, UMTA rejected the application as filed for Federal aid, and this decision is currently being considered by UMTA.

After consultation with both Governors, the Authority Chairman has noted that the revision of Authority bridge and tunnel tolls effective 5-5-75 is expected to result in additional revenues to the Port Authority of more than $40,000,000 per year and that these additional revenues could support $400,000,000 in capital improvements in mass transportation projects authorized for Authority participation: $160,000,000 allocated to the extension of the Bus Terminal now under construction, and the remaining $240,000,000 for authorized mass transit projects in each state in accordance with priorities established by responsible State officials and the Authority commissioners acting pursuant to legislative authorization and commitments to holders of Authority obligations.

In recognition of the loss of manufacturing jobs and plants in the Port District over the last two decades, in February 1976 the Authority authorized

the initiation of discussions with appropriate officials in both states and undertaking of a major study of industrial development needs in the Port District, including an investigation of energy availability and costs.

Toll Rates: Bridge and tunnel tolls were revised 5-5-75 including a 50% increase in auto tolls and 100% increase in the cost of a 30-day commutation ticket; it is estimated that the higher tolls will result in $40,000,000 additional revenues annually, with the increased toll revenues expected to enhance the Authority's ability to undertake additional mass transit projects. On 4-25-75, after receiving complaints, the Federal Highway Administrator began an investigation which will include a public hearing to determine whether the toll increases are just and reasonable. On 5-6-75, the Administrator served on the Authority a copy of a motion filed with the Administrator by a complainant for an order requiring the Authority during the pendency of the toll proceedings to create an escrow account for receipt of the revenue from the toll increase. On 5-23-75, the Authority filed a memorandum opposing this motion, and the decision on this motion is still pending. The FHA issued a notice of proposed rule making on 7-18-75 to govern bridge toll receipt procedures which would require a 90-day advance notice of a proposed toll increase and would also require the escrow of all toll increase revenues on commencement of any proceeding to determine if the increase is just and reasonable.

Litigation: On 4-30-74, United States Trust Company of New York commenced an action in New Jersey Superior Court, Bergen County, on its own behalf, as Trustee for the 40th and 41st series of Consolidated Bonds and on behalf of holders of all Consolidated Bonds, against New Jersey and the Governor and Attorney General of New Jersey, seeking a declaratory judgment that the action taken in

Addition to Appendix by Stipulation

1974 to repeal the 1962 statutory covenant that restricted the Authority involvement in deficit mass transit operations violates both the United States and New Jersey Constitutions. The plaintiff alleged in its complaint that as a result of the covenant repeal, the secondary market for Consolidated Bonds has been and will continue to be adversely affected to the deteriment of all holders. The defendants' answer denied this allegation. On 5-14-75, the validity of the 1974 action repealing the 1962 statutory covenant was upheld by the Superior Court, and this decision was affirmed on 2-25-76 by the New Jersey Supreme Court. On 5-14-76, the U.S. Trust appealed this decision to the United States Supreme Court, and on 6-28-76 the U.S. Supreme Court agreed to hear this matter during its next term.

On 5-20-76, another appeal to the U.S. Supreme Court was taken in a companion New Jersey case, instituted by a New Jersey resident who had sought unsuccessfully a judicial declaration that the 1962 statutory covenant was invalid.

On 6-17-74, U.S. Trust Company instituted an action in New York in the Supreme Court, New York County, against New York State and its Governor and Attorney General, which is still pending. This action is similar to the Trust Company's New Jersey action except that a declaration is sought that the statutory repeal violates the New York Constitution rather than New Jersey's Constitution."

On July 7, 1976, the day before the issue and sale of the Forty-second Series, outstanding Port Authority 6% Bonds were quoted at 81 bid and outstanding Port Authority 5½% Bonds were quoted at 73 bid.

The following bid prices were reported by *The New York Times* on July 9, July 13 and August 4, 1976:

Addition to Appendix by Stipulation

		Due	July 9 Bid	July 13 Bid	August 4 Bid
Indiana Toll Road	3½%	1/1/94	81½	82	83½
Kansas Turnpike	3⅜%	10/1/94	82	82	84
Mass Port	3.80%	2004	62	63	63
Mass Port	6%	2011	85	85	85
Port of N. Y.	4¾%	2003	64	64½	64½
Port of N. Y.	5½%	2008	72	72	73
Port of N. Y.	6%	2008	80½	81	82½

Addition to Appendix by Stipulation

[Letterhead of]
DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

SEAL OF
THE ADMINISTRATOR

March 9, 1976

Mr. Alan Sagner
Commissioner
State of New Jersey
Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

Dear Commissioner Sagner:

Since my December 19, 1975 decision on the PATH extension I have received numerous inquiries from members of the New Jersey Congressional delegation and from others regarding the status of that and other transit projects in the State. Press reports in early February stimulated several such questions. I am writing this letter to summarize the situation from UMTA's point of view, and am taking the liberty of sharing it with those who have sought information on these matters.

The December letter said that UMTA would be willing to consider a multi-year capital funding commitment to a package of transit improvement projects which the State might develop based upon a comprehensive transit plan and multi-source capital program. I indicated that $300-350 million might be available through Fiscal Year 1980 to support such a program under certain conditions. I further indicated that as an alternative we would be prepared to go

Addition to Appendix by Stipulation

forward on the traditional basis of single project applications for the Erie Lackawanna and New York and Long Branch improvements if you preferred, but that we would entertain a resubmission of the PATH project only as part of a comprehensive package and only at a much reduced cost to UMTA's discretionary capital grant budget. We have since made a $39 million grant for railcar purchases on the Erie Lackawanna line on this basis.

In meetings and conversations since December, you have indicated that the State would be interested in pursuing the comprehensive plan and package approach, and I know that you are working actively to develop such a submission. You have raised the question of whether the UMTA support for such a package might be raised to $400 million, and we are reviewing that question. I have indicated to you that any Federal commitment in the $300-plus million range would consume the full allocation of Section 3 capital grant funds which we could make to the State through Fiscal Year 1980 under current authorizations.

I would recite here the specific elements which my December letter and our subsequent discussions indicated should be forthcoming if you wish to follow the package approach:

1. You should submit a comprehensive transit plan and all-source capital program for the State, covering the period through Fiscal Year 1980;

2. That plan should include any necessary updating of your commuter rail program to reflect the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, and should consider the establishment of an authority to operate commuter rail service within New Jersey or on a bi-State or tri-State basis. The plan should also include attention to bus service, given the importance of that form of transit in serving passengers in your State;

Addition to Appendix by Stipulation

3. The December letter said that the transit plan "should be consistent with a comprehensive land use plan for northern New Jersey." As you know, this is a requirement of the UMTA legislation; it is not meant to stimulate the development of any new land use plan, but only to observe the legal requirement that transit programs be consistent with comprehensive land use plans; and

4. The comprehensive transit plan and capital program are to be developed by the State "together with appropriate regional planning bodies," which in this case would mean the Tri-State Regional Planning Commission since your funding applications to UMTA will apparently be confined to northern New Jersey projects. This again has reference to UMTA's statutory requirements, but I think the regional planning process takes on special significance where multi-year proposals are being submitted which would preempt all UMTA funding for the State through Fiscal Year 1980 under our current authorizations. I am sure that both we and you want to be sure that there has been adequate public discussion of such important priority setting and resource allocation steps.

If you do decide to resubmit the PATH project in a way that is responsive to the above conditions, we would want to be sure that your submission clarifies two issues which have been raised throughout the history of our review of your earlier applications:

1. You should indicate what service you intend to provide west of Plainfield; and

Addition to Appendix by Stipulation

2. You should include in the comprehensive plan and capital program the necessary feeder bus and automobile parking facilities needed to support ridership on the rapid transit system. Some source of capital funding for these ancillary services should be specifically indicated and committed to, along with the funds needed to match the Federal contribution for the PATH extension itself.

Finally, we ask you to seek to conclude an agreement with building contractors and construction unions whereby any labor disputes which might occur during the course of PATH construction could be settled without costly work stoppages. This follows a national policy which Secretary Coleman is seeking to implement in connection with all major construction projects financed by the Department of Transportation.

I hope that this letter clarifies any questions which you or others may have regarding the status of these projects. We look forward to continuing to work with you in improving public transportation service in New Jersey.

Sincerely,

ROBERT E. PATRICELLI
Robert E. Patricelli

Addition to Appendix by Stipulation

[Letterhead of]
STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

ALAN SAGNER
Commissioner

May 11, 1976

Dear Mr. Patricelli:

I am writing in response to your letter of March 9, 1976 in which you summarized, from UMTA's point of view, the status of the PATH Extension and other transit projects in our State.

In order to be as responsive as possible I shall respond to your letter question by question although some of the answers are clearly related.

I trust that your questions are resolved and that we shall receive prompt approval of this program. The people of our State have been waiting much too long for these critical projects.

Sincerely,
ALAN SAGNER
Alan Sagner
Commissioner of Transportation

MR. ROBERT E. PATRICELLI
Administrator
Urban Mass Transportation Administration
Department of Transportation
400 7th Street, S.W.
Washington, D.C. 20590

Addition to Appendix by Stipulation

Page 2
Question 1

"You should submit a comprehensive transit plan and all-source capital program for the State, covering the period through Fiscal Year 1980;"

New Jersey was one of the first states in the country to recognize the need for a comprehensive approach to transportation when it created the Department of Transportation in 1966, to replace the Department of Highways. In doing so it recognized the need for coordination of all modes of transportation and importance of adequate public transportation to meet the needs of the changing social and economic environment. The State of New Jersey was the first state to take an active role in the preservation and improvement of public transportation with the payment of a rail passenger subsidy in 1960. This program of subsidy has grown over the years until there were four railroads and numerous motorbus carriers receiving payments to cover operating deficits. To date the state has paid out over $200 million in operating expenses to continue essential services.

To give further structure and guidance for action the department has prepared, in 1968, and 1972, two master plans and is now in the process of preparing a third. These plans as well as various other documents, including the Transit Development Program, have consistently identified as state priorities the preservation and improvement of essential rail service in existing corridors and the supplementing and complementing of that service by bus service.

In addition a number of landmark studies have been performed during this period and the information gained from these studies has been invaluable in assisting the shaping of a coordinated public transportation system. A

number of technical feasibility studies are now underway or are soon to be underway and each of these studies will provide the basis for informed decisions on matters of future capital improvements, and, just as important, operational changes intended to provide the highest level of public transportation service at the most economical cost. • • •

The most recent document describing our comprehensive state transit plan is the 1972 Master Plan as supplemented by the *New Jersey Transit Development Program, 1974-1979.* In the 1972 Master Plan three critical rail corridors were discussed as being of high priority: • • • the Union-Somerset Corridor, • • •

The Erie Lackawanna: Morris and Essex Division, • • •

[and] the Coastal Section [, listing] the New York and Long Branch improvements. • • •

The *Master Plan '72* was followed by the development of the *New Jersey Transit Development Program, 1974-1979.* This document was submitted to Administrator Herringer in September, 1973, and represents the first statewide public transportation capital improvement program prepared in the United States. This document was prepared according to the standards established by the *Urban Mass Transportation Planning Requirements Guide* to meet the requirements of the Urban Mass Transportation Act of 1964 and its later amendments. Within this document, the reelectrification of the Morris and Essex Division of Erie Lackawanna, the electrification of the New York and Long Branch, and the extension of PATH to Plainfield are all discussed. • • •

On the assumption that New Jersey would be entitled to only $400 million through Fiscal Year 1980 from existing UMTA authorizations we would undertake the following high priority projects:

—PATH extension to Plainfield including equipment.

—Reelectrification of the Morris and Essex Branch of the Erie Lackawanna including electrification from Dover to Netcong and purchase of MU equipment.

—Electrification of New York & Long Branch from South Amboy to the vicinity of Red Bank including purchase of MU equipment.

Table I contains the financial information for the above three projects and calls for additional UMTA funds of $482 million. This exceeds the expected allocation of $400 million, however, by $121 million. ($82 million plus $39 million recently granted for the Erie Lackawanna project.)

The Department of Transportation will fund the balance of $121 million as follows:

—increase local share for PATH project of $50 million to be provided by the Port Authority of New York and New Jersey.

—transfer of highway funds, both Interstate and Federal Aid Urban Systems (FAUS) in an amount of $71 million.

TABLE I

PUBLIC TRANSPORTATION PRIORITY CAPITAL PROGRAM

	Total	UMTA	Local	UMTA to Date	UMTA Balance
PATH	347	278	69	0	278
EL	265	212	53	118	94
NY&LB	137	110	27	0	110
	749	600	149	118	482

• • •

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Page 2
QUESTION #3

> The December letter said that the transit plan "should be consistent with a comprehensive land use plan for northern New Jersey." As you know, this is a requirement of the UMTA legislation; it is *not meant to stimulate the development of any new land use plan, but only to observe the legal requirement that transit programs be consistent with comprehensive land use plans; and*

"The transit plan of the State of New Jersey is consistent with the comprehensive land use plan for Northern New Jersey. The transit plan for New Jersey has been developed in conjunction with the Tri-State Regional Planning Commission, the designated comprehensive planning organization for the region."

• • •

As you know all three of these priority projects have been endorsed by the official metropolitan Planning Organization, as well as by the unofficial but highly respected Regional Planning Association, as being consistent with the transportation needs of the region as they relate to the overall economic development and land use objectives. In the case of the NY & LB and the EL, this was recognized by UMTA prior to their granting of a "letter of no prejudice" in the case of the former and an actual grant in the case of the latter.

With regard to PATH allow us to restate the positive steps New Jersey has taken, will be taking, and is prepared to do, particularly as they relate to the relationship of the PATH extension and land use plan in the PATH service area.

The affected communities along the Path corridor have endorsed the project, and have committed themselves to

Addition to Appendix by Stipulation

utilize their authority to support the PATH project's non-transportation objectives. We call your attention to the April 1, 1974 submission, appendices B & C. As previously pointed out to you, Union County has already set in motion the organization for resolving various development issues arising from the PATH extension project. This is the Union County Transportation Advisory Committee, which will function in concern with a Station Areas Needs Study. Parking, traffic management, land development, and environmental improvement will be under review. The citizen input through the Advisory Committee will focus on local problems. This Department supports this activity and has representation at meetings and discussions.

The City of Newark, in anticipation of PATH, has proposed several major development projects. This includes a sports and entertainment coliseum in downtown Newark adjacent to Pennysylvania Station and a $15 million hotel/commercial complex adjacent to the proposed McClellan Street PATH station, creating 500 new jobs. PATH would also further ongoing Newark revitalization projects and improve accessibility for Newark Airport. Inadequate ground access to the airport is repeatedly identified as an impediment to airport usage.

In addition, PATH will help in the redevelopment and revitalization for the urban areas along the corridor, and provide needed service for both the blue collar and white collar residents of both urban and suburban communities, consistent with local planning efforts as well as statewide plans.

The Port Authority of New York and New Jersey has played a major role in the over-all revitalization of the region. In addition to earmarking additional automobile tolls for public transportation uses, including PATH, the Port Authority is actively studying potential industrial

Addition to Appendix by Stipulation

development sites within the port district, most of which involve cities served by PATH, further adding to the value of a PATH extension as a critical transit spine for a growing economic development function.

The State of New Jersey recognizes the responsibility incumbent upon the state in providing for the efficient allocation of land resources. Governor Byrne, in his Annual Message delivered on January 13, of this year, declared:

> I strongly support the concept of local control of zoning but the inevitable regional impact of large-scale projects must be taken into account. The Development Review Act I have proposed will provide such an overview in accordance with state guidelines. Such an approach is essential to rational, coordinated land use and planning.
> Under this act, the State will identify areas suitable for major economic and residential development and also designate areas that require special protection from such development. Thus, major capital investment decisions can be coordinated with broad land-management policics. Both are vital if we are to arrest the urban sprawl that has disfigured much of New Jersey and so damaged our economy and environment.

Furthermore endorsing the PATH proposal, Commissioner Sheehan of the Department of Community Affairs, referred to this proposal, stating that "two things appear certain to be incorporated into the comprehensive development plan. First, there will be a commitment to the revitalization of our older urban areas; and secondly, there will be a commitment to preserve, as much as possible, New Jersey's currently undeveloped farmland and open space." (Letter attached plus letter from Commissioner Bardin of the Department of Environmental Protection).

Addition to Appendix by Stipulation

[Letterhead of]
STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DAVID J. BARDIN, COMMISSIONER

May 27, 1975

Honorable Alan Sagner
Commissioner
Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

Dear Commissioner Sagner:

In response to your request, the Department of Environmental Protection has briefly reviewed the general proposal by the Port Authority of New York and New Jersey to extend PATH transit service from Newark to Plainfield, including the Environmental Report prepared on the project by the Port Authority of New York and New Jersey. On the strength of our initial review, the Department of Environmental Protection endorses the basic concept of this PATH extension and offers the observations noted below regarding air quality.

The Department of Environmental Protection endorses the concept of increasing the State's mass transit capacity in order to reduce the dependence on the private automobile, to reduce net air pollution emissions and to conserve energy. It appears to us that the PATH extension would help achieve these goals. The implementation of the PATH extension will reduce the total number of vehicular miles driven in the northeastern portion of New Jersey and thus

Addition to Appendix by Stipulation

be consistent with the State's "Transportation Control Plan" for achieving air quality as called for by the Clean Air Act.

Moreover, the Department's Bureau of Air Pollution Control has compared the PATH extension with various alternatives presented in the Environmental Report, including commuter service by the Central Railroad of New Jersey. Based on the review of the Environmental Report, the Bureau concurs that an electrically-operated PATH system to Plainfield would result in an overall improvement in air quality. It should be noted that the anticipated net improvement reflects: (a) reduced emissions (CO, NO_x, particulates and hydrocarbons) from many automotive sources operating in a relatively small area; (b) increased emissions (SO_x, NO_x, and particulates) from a few electric power generating stations widely dispersed over a large area; and (c) reduced emissions (NO_x, particulates and hydrocarbons) from the CNJ diesel-powered locomotives operating in a relatively small area. Reflecting all of the foregoing, the Report shows a net air quality improvement under the PATH extension.

FAITHFULLY,

DAVID J. BARDIN
David J. Bardin
Commissioner

Addition to Appendix by Stipulation

[Letterhead of]
STATE OF NEW JERSEY
DEPARTMENT OF COMMUNITY AFFAIRS

PATRICIA Q. SHEEHAN
COMMISSIONER

May 14, 1975

The Honorable Alan Sagner, Commissioner
New Jersey Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

Dear Commissioner Sagner:

At your request, we have reviewed the proposed extension of the PATH line from Newark to Plainfield, on the basis of the State's overall land use needs and the State's growth and development plan. We would offer the following comments.

While New Jersey, like most other states, has delegated planning and zoning responsibilities to local units of government, it does retain the right to provide overall planning and policy guidance. This guidance is particularly appropriate for investments made by the State for the benefit of more than one municipality, and which can have lasting developmental effects. Under the legislative mandate granted to it, the Department of Community Affairs has overall responsibility for providing a growth and development plan for New Jersey.

The work of the planning staff is going forward, and by the end of the next fiscal year, a draft of the comprehensive development plan will be published. After thorough discussions with municipalities and counties, with other

Addition to Appendix by Stipulation

State Departments, and with land use, energy, and other resource experts, two things appear certain to be incorporated in the comprehensive development plan. First, there will be a commitment to the revitalization of our older urban areas; and secondly, there will be a commitment to preserve, as much as possible, New Jersey's currently undeveloped farmland and open space.

In light of this consensus and other considerations related to the future development of the State, it is our judgment that the PATH extension is most consistent with the evolving overall growth and development strategy. First, it would provide a needed boost to the redevelopment of Plainfield, as well as assisting the rehabilitation of other urban areas along the route of the PATH extension. Secondly, it would make the whole corridor between Plainfield and Newark more attractive for development and redevelopment and attract growth into that area. This redevelopment would replace the pattern of dispersal which is so wasteful of land and energy resources. This, we think, will help preserve other areas of the State as productive farmland or as open space. Finally, there are other important positive benefits in providing linkages between residences and work places, and in providing additional employment opportunities at a time when they are so badly needed.

For these reasons, we are happy to join with you in endorsing the PATH extension and urging its prompt approval, funding and construction.

Very truly yours,

PAT Q. SHEEHAN
Patricia Q. Sheehan

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Page 2
Question 4

> "The comprehensive transit plan and capital program are to be developed by the State "together with appropriate regional planning bodies," which in this case would mean the Tri-State Regional Planning Commission since your funding application to UMTA will apparently be confined to northern New Jersey projects. This again has reference to UMTA's statutory requirements, but I think the regional planning process takes on special significance where multi-year proposals are being submitted which would preempt all UMTA funding for the State through Fiscal Year 1980 under our current authorizations. I am sure that both we and you want to be sure that there has been adequate public discussion of such important priority setting and resource allocation steps."

The comprehensive public transportation plan we have been describing above, as well as the supporting capital program, have been developed in conjunction with both the Tri-State Regional Planning Commission and the Delaware Valley Regional Planning Commission. The most recently published public transportation Master Plan of the TSRPC, *Maintaining Mobility,* issued in September 1975, lists, as priority projects, the extension of PATH to Plainfield, the electrification of the New York and Long Branch from South Amboy to the vicinity of Red Bank and the acquisition of new passenger rolling stock for this service, the re-electrification and re-equipping of the Morris and Essex Division of Erie Lackawanna and the Regional Bus Program.

This plan has been subjected to considerable public discussion prior to adoption and such review and discussion is continuing during the process of updating.

Addition to Appendix by Stipulation

The MPO (Tri-State) agrees with the Department of Transportation that the priority capital program described in question one above should receive the highest funding priority under the limited amount of funds to be provided by UMTA (attached is a letter from the Executive Director of Tri-State which supports this position). Furthermore, we in the State are fully cognizant of the fact that no such major decision can ever satisfy everyone. We feel that this issue has been discussed in a full and spirited manner both publicly and privately and we are prepared to take the praise or criticism associated with the decision to do this program. These projects are ready to go and we must move forward as rapidly as possible.

• • •

Page 3
QUESTION #1

"You should indicate what service you intend to provide west of Plainfield":

The Department has been deferring, with Tri-State and UMTA's knowledge, the start of the technical feasibility study of *public transportation services to be offered west of Plainfield,* pending receipt of a decision from UMTA on the proposed PATH extension. The study design for this effort has been modified to take into accounting the changing circumstances of ConRail's inception and this work program will soon be submitted for approval. Alternate public transportation services to the west of the proposed terminus of PATH will be considered, including:

- the further extension of PATH
- suburban railroad service
- light rail transit service

Addition to Appendix by Stipulation

- feeder bus service to PATH at Plainfield
- closed door commuter rail service to Newark
- existing bus service to Newark and New York

The study will encompass the territory along the CNJ to the vicinity of Phillipsburg and also the territory along the former Reading Company lines from their connection with CNJ at Bound Brook westward to the last station in New Jersey at West Trenton. This study will be performed in conjunction with the planning staffs of the counties the lines traverse and will present, upon completion, a workable public transportation system to connect with PATH at Plainfield. This service, to the west of Plainfield, can be planned, equipped, and placed in service by the time PATH service is initiated at Plainfield.

Supreme Court, U. S.
FILED
JUN 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

WILLIAM F. HYLAND,
Attorney General of the State of New Jersey,
Attorney for Appellees,
State House Annex,
Trenton, New Jersey. 08625

By Special Counsel:

MICHAEL I. SOVERN,
MURRAY J. LAULICHT,
HAROLD S. H. EDGAR.

Dated: June 7, 1976

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

On Appeal from the Supreme Court of New Jersey

Motion To Dismiss For Want of a Substantial Federal Question

Appellees, the State of New Jersey, Governor Brendan T. Byrne and Attorney General William F. Hyland, move the Court to dismiss this appeal on the ground that the

appeal does not present a substantial federal question requiring plenary consideration, with briefs on the merits and oral argument, for its resolution.

Appellant's claim that the challenged legislation was an arbitrary exercise of the States' police power is refuted by a massive record, both stipulated and litigated, that makes clear the contrary proposition. Significantly, none of the eight judges who have reviewed it to date, in a forum of appellant's choosing, has thought otherwise. Their unanimous conclusion is reflected in the trial court's finding that "the claim that bondholder security has been materially impaired or destroyed by the repeal is simply not supported by the record." A108*

The essence of appellant's remaining claims, here as below, is that the Contract Clause provides absolute protection to every undertaking contained in or applicable to municipal bonds, regardless of how peripheral it is to securing the underlying obligation or how seriously it impedes accomplishment of vital governmental purposes. Courts have uniformly rejected that position. To adopt it would create a specially privileged class enjoying a unique immunity denied to everyone else who enters into contracts.

Statement

This is an appeal from a judgment of the Supreme Court of New Jersey, unanimously affirming a judgment of the Superior Court of New Jersey, upholding the con-

* "A" and "B" refer to the Appendix to Appellant's Jurisdictional Statement. "J.S." refers to Appellant's Jurisdictional Statement. "T." refers to the trial transcript. "Stip." refers to the Stipulation. "C" refers to a trial court exhibit. "S" refers to a State exhibit.

stitutionality of Chapter 25 of the New Jersey Laws of 1974. B5-6. The challenged 1974 statute, together with concurrent and identical legislation of the State of New York, Chapter 993 of the New York Laws of 1974, repealed legislation enacted in 1962 and hereinafter referred to as the 1962 covenant, whereby the States of New York and New Jersey and the Port Authority of New York and New Jersey were precluded from applying any of the Authority's revenues and reserves for passenger railroad purposes other than the Hudson & Manhattan Railroad (now known as PATH) unless permitted by the extraordinarily complicated criteria set forth in the 1962 legislation, N.J.S.A. 32:1-35.55. B1-4.

This action was commenced by appellant on April 30, 1974. In December 1974, the parties signed and filed a 366-page stipulation of facts with respect to the establishment and facilities of the Port Authority of New York and New Jersey; New Jersey's public transportation requirements, including analyses of demographic and transportation factors, the energy crisis and health and environmental factors; a history of rapid transit passenger rail operations in the Port District and the Metropolitan New York area from 1921 to late 1974; federal mass transportation policy as reflected in federal legislation and federal administrative determinations; the financial position of the Port Authority; a description of Port Authority bonds and bond resolutions, including the comments of the two principal bond rating agencies, Moody's and Standard & Poor's; and additional materials with respect to the enactment of the 1962 covenant and the 1974 repeal legislation. The stipulation was accompanied by 8 lengthy exhibits, including the then most recent plan of the New Jersey Department of Transportation and the latest Official Statement (or prospectus) and Annual Report of the Port Authority; a detailed analysis pre-

pared in 1961—and thus prior to the 1962 covenant—by the then General Solicitor of the Port Authority of its financial and bonding structure; a 1971 consultant's report on the Port Authority's participation in a new passenger railroad operation; and materials from 1971 and 1972 State legislative hearings with respect to the Port Authority's participation in rail mass transit.

The stipulation and its accompanying exhibits demonstrated that although the 1962 covenant did little or nothing to enhance bondholder security, it had a profoundly deleterious effect on the coordination of transportation in the Port District. It impeded rational solution of the pressing problems of increasing highway congestion, deteriorating mass transit, poisonous air pollution and uncertain petroleum supplies. Appellees were, accordingly, prepared to rest their defense of the repeal legislation on the stipulated materials.

Appellant, however, requested and was granted an opportunity to present testimony on two additional factual questions tendered by its complaint: whether Port Authority bondholders relied in any meaningful sense upon the 1962 covenant and whether the repeal of the 1962 covenant had an adverse effect on the secondary market for Port Authority bonds. The trial court also indicated that it would be desirable to present the testimony of an expert witness with respect to the financial structure of the Port Authority and the interrelationships of the 1962 covenant and the other requirements set forth in the Port Authority statutes and bond resolutions. T. 8-10, 458-59; C-2. Five days of testimony and dozens of additional exhibits were introduced with respect to these matters at the trial conducted in February 1975.

A. The lower courts found that repeal had no adverse effect upon bondholders.

On May 14, 1975, the trial court issued its comprehensive opinion sustaining the validity of New Jersey's repeal of the 1962 covenant.[1] With respect to the disputed issue of bondholder reliance upon the 1962 covenant, the trial court found that "few, if any, members of the investment community ever analyzed closely the actual effect of the 1962 covenant upon bondholder security," A90, that "the covenant cannot be said to have been the 'primary consideration' for the purchases having been made," A91, and that neither the interest rates on Port Authority bonds nor the ratings assigned to these bonds by the principal rating services were affected by the presence or absence of the 1962 covenant, A89-92. With respect to the disputed question whether the repeal of the 1962 covenant had an adverse effect upon the secondary market in Port Authority bonds, the trial court, on the basis of extensive trial testimony and exhibits comparing prices of Port Authority bonds and bonds issued by other tax-exempt agencies, found that: "The bottom line of the plaintiff's proofs on this issue is simply that the evidence fails to demonstrate that the secondary market price of Authority bonds was adversely affected by the repeal of the covenant, except for a short-term fall-off in price the effect of which has now been dissipated insofar as it can be related to the enactment of the repeal." A93-94.

The trial court carefully analyzed the numerous and powerful statutory and contractual provisions other than

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[1] The Supreme Court of New Jersey affirmed, with one Justice partially dissenting, "substantially for the reasons set forth in the opinion of" the trial court. A4. Justice Pashman's partially dissenting opinion complimented the trial court's "very enlightened and comprehensive opinion." A9.

the 1962 covenant that fully protect the security of Port Authority bondholders. A51-61. They include among other protections: the General Reserve Fund, irrevocably pledged as security for the payment of interest and principal on all Port Authority bonds, which contained $173,487,000 in 1974; the 1.3 test, which insists that net revenues exceed prospective debt service by a healthy margin before new Consolidated Bonds may be issued; the Consolidated Bond Reserve Fund, pledged as additional security for Consolidated Bonds, which grew from $7.1 million in 1972 to $21.9 million in 1973 to $46.8 million in 1974; a pledge of the net revenues from each facility financed by the issuance of Consolidated Bonds to the payment of debt service on all Consolidated Bonds; a contractual commitment to establish and collect "rents, tolls and other charges in connection with facilities the net revenues of which are pledged as security for Consolidated Bonds, to the end that at least sufficient net revenues may be produced therefrom at all times to provide for the debt service upon all Consolidated Bonds"; a prohibition on the application of any part of the Consolidated Bond Reserve Fund for the payment of operating deficits of a facility acquired without the issuance of Consolidated Bonds; and yet another prohibition on the issuance of Consolidated Bonds for a facility not previously financed by Port Authority bonds unless the Commissioners of the Port Authority certify that the issuance of the Consolidated Bonds for the proposed additional facility will not "materially impair the sound credit standing of the Authority or the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds."

Thus, before the 1962 covenant was enacted and after its repeal, the Port Authority could not give its revenues to other agencies to subsidize mass transit, and it could not itself undertake any mass transit projects that might endanger the bondholders' security. It could no more take over the New York City subway system, whose irrelevant deficits appellant regularly recounts, J.S. 8, 13, than it could the national debt. A109. The trial court concluded, accordingly, that the repeal of the 1962 covenant did not, as a factual matter, materially affect the obligation of appellant's contract:

> The repeal, of course, leaves intact the provisions of the CBR [the Consolidated Bond Resolution adopted by the Authority on October 9, 1952] and the series resolutions which now constitute, together with the General Reserve Fund Act, the same measure of the bondholders' contractual security rights as existed prior to the enactment of the covenant in 1962. Presumably rational investors—including the plaintiff—purchased hundreds of millions of dollars of consolidated bonds prior to 1962, without the additional security afforded by the covenant and with full knowledge of the power of the States to direct the Authority into mass transit operations. The two principal bond rating services, upon whose judgment the financial community places great reliance, rated the consolidated bonds—minus the covenant—as securities as to which no default was anticipated.

The claim that bondholder security has been materially impaired or destroyed by the repeal is simply not supported by the record. The pledge of the Authority's net revenues and reserves remains

intact; the Authority will still be barred from the issuance of any new consolidated bonds unless the 1.3 test required by the CBR is met; and the Authority will continue to be prohibited from the issuance of any consolidated bonds or other bonds secured by a pledge of the general reserve fund without the certification required by section 7 of the series resolutions, to wit: that in the opinion of the Authority the estimated expenditures in connection with any additional facility for which such bonds are to be issued would not, for the ensuing ten years, impair the sound credit standing of the Authority, the investment status of its consolidated bonds, or the Authority's obligations to its consolidated bondholders. A108.

The soundness of the trial court's conclusion that repeal of the 1962 covenant had no material significance was promptly confirmed by leading investment advisers. Within two weeks after the trial court's opinion, Barr Brothers & Co., one of the three largest dealers in Port Authority bonds, issued a report specifically referring to the trial court's decision, summarizing the other bondholder protections and the great financial strength of the Port Authority, and concluding:

> Whether or not the Port Authority ever gets involved in Mass Transit, we feel it continues to be one of the finest revenue credits in the country, amply protected by the basic bond resolution, excellent management and some highly profitable and monopolistic facilities that can more than carry a reasonable amount of Mass Transit, particularly with the recent toll increases on the Hudson crossings providing additional revenues.

This report is from a firm that is a member of the class represented by appellant and from which it selected one of its expert witnesses. See J.S. 14, fn.

In June 1975, the month after the trial court's opinion, the two principal bond rating agencies, Standard & Poor's and Moody's, each confirmed the continuation of the Port Authority's "A" rating.[2] Standard & Poor's, while expressing a concern about the effect of future Port Authority involvement in mass transit, says: "Despite this concern, we are continuing our 'A' rating on the Port Authority's Consolidated Bonds and are also rating the new Consolidated Notes 'A' based upon the Authority's strong operating, financial and management record and the prospect for a continuation of this outstanding record." Moody's, also referring to the trial court's opinion, continues its "A" rating on Port Authority obligations because "earnings of the present facilities are good, reserves for debt service continue strong, and recent toll increases have further strengthened its financial position at this time."

These conclusions are not surprising. It was not bondholders who sought the 1962 covenant, but the management of the Port Authority. A89-90; Stip., p. 158; S-40. Until 1962, that management had resolutely, and successfully, opposed meaningful Port Authority participation in the carriage of persons by rail. See, *e.g.*, A61-65. A commitment to rail transit would have deflected them from other missions to which they attached higher priorities. See, *e.g.*, S-33. Forced at last to accept some responsibility for rail transit, they conceived of the covenant and

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[2] The "A" rating signifies that the bonds are of investment quality and that no default in payment of interest or principal is anticipated. A91.

insisted upon its enactment, as the price of their acquiescence.[3]

B. The lower courts found that repeal of the covenant was a proper exercise of the States' police power.

Though repeal of the 1962 covenant took little or nothing from appellant, it did make possible rational planning and administration of bi-State transportation efforts. The trial court found that by early 1974, when the repeal legislation was introduced, the public need for mass transportation facilities "became unprecedented as the result of the promulgation of stringent federal air pollution regulations designed to reduce automobile usage and the emergence of an energy crisis which threatened the entire system of private automobile transportation in the two States." A107. This finding is amply supported by the record.

In November 1973, the Administrator of the federal Environmental Protection Agency promulgated regulations designed to achieve a 67 percent reduction in hydro-

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[3] The State has argued from the outset that the 1962 covenant is not a constitutionally protected contract both because the Compact Clause, Art. 1, §10, cl. 3, and the Port Authority Compact itself make it voidable, and because subsequent federal developments have preempted it. The court below did not rule on these questions prefering to assume *arguendo* that a contract was made and to hold the repeal valid.

Should this Court note probable jurisdiction in the United States Trust Company case, however, it ought to note probable jurisdiction in *Gaby* v. *Port Authority of New York & New Jersey et al.*, No. 75-1712 as well, so that these issues, which have not been passed upon by the courts below, A110, may be considered fully.

carbon emissions and a 47 percent reduction in carbon monoxide emissions in the northern part of New Jersey. 38 Fed. Reg. 31388 *et seq.* (November 13, 1973). In issuing these regulations, the Administrator specifically emphasized the importance of the development of mass transit facilities to the improvement of New Jersey's air quality: "The development of large-scale mass transit facilities and the expansion and modification of existing mass transit facilities is essential to any effort to reduce automotive pollution through reductions in vehicle use." A86.

Moreover, the repeal legislation was introduced on February 15, 1974, Stip., p. 348 fn., at the very height of the energy crisis. Eleven days earlier, the New Jersey Legislature had enacted the Emergency Energy Fair Practices Act of 1974, which found that "an energy shortage now exists and may continue for the foreseeable future"; ten days earlier, Governor Byrne, in his first Executive Order, had proclaimed that an energy emergency existed. Stip., p. 43; A87.

In February 1974, the President of the United States submitted a Message to Congress on the Energy Crisis, which said that, "It is now widely recognized that the development of better mass transit systems may be one of the key solutions to both our energy and environmental problems." A87-88. Congress has repeatedly expressed agreement with this viewpoint. For example, the Regional Rail Reorganization Act of 1973, enacted on January 2, 1974, contains specific findings by Congress that "rail service and rail transportation offer economic and environmental advantages with respect to . . . energy efficiency and conservation . . . to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest." A88. See also the Energy

Supply and Environmental Coordination Act of 1974, 50 U.S.C. sections 791 *et seq.;* and the National Mass Transporation Assistance Act of 1974, A80, fn. 29. During the debate on the latter Act in late 1974, Congressman Joseph Minish of New Jersey, one of its principal sponsors, reminded Congress:

> With our present energy situation and the threat of a renewed crisis in this area, the need for mass transit aid has become ever more critical. Buses and rail cars consume only a fraction of the energy that a private automobile does, yet we cannot expect the commuting public to reduce significantly its use of private cars if we do not provide suitable alternative sources of transportation. Stip., p. 278.

In May 1975, as a direct result of the repeal of the 1962 covenant, the Port Authority increased its vehicular bridge and tunnel tolls, which had remained constant since 1927, in order "to increase its ability to finance vital mass transit improvements." C-18. The toll increase revenues, estimated at $40 million per year, will be used to finance mass transit projects that remained dormant while the covenant stood. See A80-84.

It deserves emphasis that the $40 million annual increase in revenues resulting from the toll increase would not have been available unless substantially committed to mass transit. The bridge toll increases are subject to federal approval and that approval would probably be withheld but for the intended application of the funds to mass transit. See *Delaware River Port Authority* v. *Tiemann,* 403 F. Supp. 1117 (D.N.J. 1975); Stip., pp. 280-85. In any event, the Governors would not have approved the increase if its sole purpose were to add redundant funds to already ample bond reserves in excess of $250 million.

Appellant's assertion that bondholders have lost $240 million of "their" protection J.S. 24 fn., 18, is plainly contrary to fact. All of that money, and much more, will come from funds generated by the toll increase, not otherwise available to bondholders.

The Three Questions Presented Are Not Substantial Federal Questions.

Appellant asserts first that,

> The judgment of the New Jersey Supreme Court presents the substantial question whether a State can unilaterally and retroactively revoke a solemn covenant it has made with holders of municipal bonds, or whether such bondholders are protected by the Contract and Due Process clauses of the United States Constitution. J.S. 13.

Neither of the courts below has suggested that bondholders are not "protected by the Contract and Due Process clauses of the United States Constitution." On the contrary, the Supreme Court of New Jersey has repeatedly and emphatically declared its solicitude for the rights of bondholders. For example, in *N.J. Sports & Exposition Auth.* v. *McCrane,* 61 N.J. 1, 26, 292 A.2d 545, 558, *appeal dismissed,* 409 U.S. 943 (1972), the Court said that when purchasers buy bonds "a solemn pact comes into being between them and the State" that is "secure against impairment by succeeding legislatures except for a proper exercise of the State's never abdicated police powers." And, in *N.J. Highway Auth.* v. *Sills,* 111 N.J. Super. 313, 268 A.2d 308 (Ch. Div. 1970), *aff'd,* 58 N.J. 432, 278 A.2d 489 (1971), the Court invalidated State legislation having a trivial effect upon bondholders because the legislation

was "not addressed to any problem of state-wide importance as was the Texas legislation considered in *City of El Paso.*" 111 N.J. Super. at 329, 268 A.2d at 312.

This steadfast record of concern for bondholders may well explain why appellant, a New York based bank, and its New York counsel chose to litigate first in New Jersey, though it had its choice of federal and state courts in New York as well.

All the courts below did was: (1) find that appellant had failed to establish the facts necessary to support its claim of an infringement upon its constitutional rights; and (2) decide as a matter of law that appellant was wrong in urging that any change in a contract with bondholders violates the Constitution.

The trial court's assessment of appellant's legal theories is as applicable to its jurisdictional statement as to appellant's presentation below:

> The thrust of plaintiff's argument is that any impairment of the security provisions of a contract violates the Contract Clause. It seeks to recreate a theory of the Contract Clause which, if ever imbedded in our constitutional law, no longer exists. As reflected in the course of more than 150 years of its judicial interpretation, the Contract Clause must be construed in harmony with the power of the States to alter or modify their contractual obligations where an important public interest requires. A109.

The trial court's legal analysis is unquestionably right. The history of the Contract Clause is an oft-told tale.[4]

[4] See, *e.g.*, Wright, *The Contract Clause and the Constitution* (1938); Hale, *The Supreme Court and the Contract Clause,* 57 Harv. L. Rev. 512, 621, 852 (1944).

The Clause was construed expansively in the early nineteenth century at a time when it was the sole source of federal authority to restrain unreasonable State legislation.[5] Despite the Framers' probable concern with State laws releasing private debts, see Federalist Papers No. 44, the Clause was held applicable to government contracts. The leading cases are *Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87 (1810), and *Trustees of Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat.) 518 (1819). Even these earliest cases, however, expressed concern for unduly hampering State governments in the organization of their internal affairs. In *Dartmouth College,* Chief Justice Marshall observed: "that the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." 17 U.S. (4 Wheat.) at 629.

The earliest Contract Clause standards were refashioned, and in the process liberalized, under the weight of government's increasing responsibilities. In a series of cases this Court held that all contracts are made subject to implied conditions, among them the fair exercise of the State's police power in the interests of public health, safety and welfare. No legislature can bargain that power away. The trial court accurately summarized these cases as follows:

> First in dictum, *Boyd* v. *Alabama,* 94 U.S. 645, 650, 24 L.Ed. 302 (1877), and then by direct application of the doctrine, the court held that a lottery franchise granted for a definite term of years could be

[5] *Barron* v. *Baltimore,* 32 U.S. (7 Pet.) 243 (1833), held the Bill of Rights inapplicable to the States; *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386 (1798), held the ex post facto clause inapplicable to civil legislation.

repealed. *Stone* v. *Mississippi,* 101 U.S. 814, 25 L.Ed. 1079 (1880); *Douglas* v. *Kentucky,* 168 U.S. 448, 18 S.Ct. 199, 42 L.Ed. 553 (1897). In *Northwestern Fertilizing Co.* v. *Hyde Park,* 97 U.S. 659, 24 L.Ed. 1036 (1878), it was held that a franchise to operate a fertilizer factory at a given location could be negated by the exercise of the police power to abate a nuisance. Similarly, the power to control the use of the public streets may not be bargained away, *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U.S. 548, 34 S.Ct. 364, 58 L.Ed. 721 (1914); *Denver & Rio Grande R. Co.* v. *Denver,* 250 U.S. 241, 39 S.Ct. 450, 63 L.Ed. 958 (1919), nor can the state contractually bind itself not to exercise its power of eminent domain, *West River Bridge Co.* v. *Dix,* 47 U.S. (6 How.) 507, 12 L.Ed. 535 (1848); *Pennsylvania Hospital* v. *Philadelphia,* 245 U.S. 20, 38 S.Ct. 35, 62 L.Ed. 124 (1917), or to change the location of its governmental subdivisions, *Newton* v. *Mahoning County,* 100 U.S. 548, 25 L.Ed. 710 (1880). The broadest expression of this view of the police power during this period is to be found in *Chicago & Alton R.R.* v. *Tranbarger,* 238 U.S. 67, 35 S.Ct. 678, 59 L.Ed. 1204 (1915), where Justice Pitney said:

"It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution [the Contract and Due Process Clauses] has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise • • •. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of public health, morals or safety. [238 U.S. at 76-77, 35 S.Ct. at 682]." A100-101.

The path of Contract Clause doctrine from 1915 to now has led to progressive recognition that State police powers cannot be limited to discrete categories of State activity: eminent domain, government institutions, morals, health, key industries.[6] Rather the police power is a general one; what counts is whether it is fairly exercised. That assessment calls for harmonizing use of the reserved power with the constitutionally mandated policy of contract protection. That is the central meaning of *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398 (1934), in which this Court upheld emergency debtor relief laws, and its progeny, particularly *City of El Paso* v. *Simmons,* 379 U.S. 497 (1965). There this Court, by an 8-1 majority, rejected Justice Black's arguments for a formalistic approach and held squarely that "it is not every modification of a contractual promise that impairs the obligation of contract under federal law" (379 U.S. at 506-507). In a key passage, Justice White wrote:

> The decisions "put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula," as Chief Justice Hughes said in *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398. The *Blaisdell* opinion, which amounted to a comprehen-

[6] We note that this case falls clearly within two of the classic pigeonholes, promotion of health and regulation of government institutions.

sive restatement of the principles underlying the application of the Contract Clause, makes it quite clear that "[n]ot only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'had the result of modifying or abrogating contracts already in effect.' *Stephenson* v. *Binford,* 287 U.S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. . . . This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." 290 U.S. at 434. Moreover, the "economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." *Id.* 290 U.S. at 437. The State has the "sovereign right . . . to protect the . . . general welfare of the people. . . . Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" *East New York Savings Bank* v. *Hahn,* 326 U.S. 230, 232-233. As Mr. Justice Johnson said in *Ogden* v. *Saunders,* "[i]t is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts." 12 Wheat. 213, 6 L.Ed. 606, 633.

> Of course, the power of a state to modify or affect the obligation of contract is not without limit. "[W]hatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannct be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspect. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." *Blaisdell, supra,* 290 U.S. at 439.[7]

As the last sentence quoted makes clear, the State may not have a policy of repudiating debts, destroying contracts or denying the means to enforce them. In specific instances, however, it may modify contracts where the end is legitimate and the measures taken are reasonable. And in determining whether the measures are reasonable, the legislature has "wide discretion."[8]

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[7] Appellant errs by trying to make the specific facts that supported a finding of reasonableness in *El Paso* into a doctrinal litmus. J.S. 22-24. It compounds the error in several ways: among them, it ignores that fact that Simmons lost his land while appellant has lost nothing.

[8] This would suffice to dispose of appellant's claim that the legislatures should have adopted the "obvious alternatives" to repeal, see J.S. 23 fn., even if those alternatives were available. In fact, they were not and appellant's suggestion is quite misleading. For example, appellant says that the States should "refund outstanding bonds protected by the Covenant and secure bondholder consent un-

(Footnote continued on following page)

These principles have provided State and federal courts with workable guidelines. See, *e.g., Calif. Teachers Ass'n* v. *Newport Unified School District,* 333 F. Supp. 436 (C.D. Cal. 1971); *Ohlson* v. *Phillips,* 304 F. Supp. 1152, 1156 (D.C. Colo. 1969), *aff'd,* 397 U.S. 317 (1970); *Lyon* v. *Flournoy,* 271 Cal. App.2d 774, 76 Cal. Rptr. 869 (1969), *appeal dismissed for want of a substantial federal question,* 396 U.S. 274 (1970); *Michigan Transp. Co.* v. *Secretary of State,* 41 Mich. App. 654, 201 N.W.2d 83 (1972), *leave to appeal denied,* 389 Mich. 767 (1973); *Albigese* v. *City of Jersey City,* 127 N.J. Super. 101, 112-13, 316 A.2d 483, 488-89 (Law Div.), *modified on other grounds,* 129 N. J. Super. 567, 324 A.2d 577 (App. Div. 1974); *Matter of Farrell* v. *Drew,* 19 N.Y.2d 486, 281 N.Y.S.2d 1, 227 N.E.2d 824 (1967).

These guidelines are as applicable to municipal bonds as to any other form of contract and the courts of many states have so held. Leading cases include: *Opinion of the Justices,* 313 N.E.2d 882 (Mass. 1974); *Massachusetts Port Authority* v. *Treasurer & Receiver General,* 352 Mass. 755, 227 N.E. 2d 902 (1967); *N.J. Sports & Exposition Auth.* v. *McCrane, supra,* 61 N.J. 1, 292 A.2d 545, *appeal dismissed,* 409 U.S. 943 (1972). And see, *e.g., Arizona State Highway Comm'n* v. *Nelson,* 105 Ariz. 76, 549 P.2d 509 (1969); *Beaumont* v. *Faubus,* 239 Ark. 801, 394 S.W.2d 478 (1965). Even before *El Paso,* courts held bonds, like other contracts, subject to the police power.

(Footnote continued from preceding page)

der those issues not yet refundable." Appellant proffers this suggestion although its counsel has sworn that the owners of more than $1.5 billion of the $1.6 billion in outstanding Port Authority bonds are unknown to the Port Authority or its paying agents, and although it knows that all of those bonds were issued during a period when interest rates were far lower than those currently prevailing.

E.g., New Bedford v. *New Bedford, Woods Hole, Martha's Vineyard & Nantucket S.S. Auth.,* 336 Mass. 651, 148 N.E. 2d 637, *appeal dismissed for want of a substantial federal question,* 358 U.S. 53 (1958); *Opinion of the Justices,* 334 Mass. 721, 136 N.E.2d 223 (1956); *Jacksonville Port Auth.* v. *State,* 161 So.2d 825 (Fla. 1964).

The central issue in this case is not the legal rules but rather their application to this massive record, and it is with that application that this statement is mainly concerned. One key point warrants repeated emphasis. Nothing has happened to appellant. It does not allege that the probability of repayment of the bonds has been materially affected; nor was it, at trial, able to show any dimunition of the bonds' value in the secondary market. Indeed, an investment company from whom appellant secured an expert witness affirmed that truth immediately following the trial court's opinion.

The now repealed law provided bondholders with no security at all. It did not create a lien against specific funds; it imposed no restrictions on deficit spending generally. It stated only that the purposes be other than passenger rail transit. For example, large deficits for buses were permitted. Yet what could be more absurd, and destructive of sound governmental policy, than that the choice of transit mode in the Port District be determined by the availability of Port Authority financing for one mode rather than the other—no matter what the relative balance of energy, public health and ecology considerations. The absurdity is heightened when, as here, toll increases that are permissible only because of their intended diversion to mass transit uses have substantially increased the Port Authority's revenues, making the whole program one with no net effect on bondholders.

It would be an abdication of the Government's responsibility to allow bondholders so tangentially involved to determine regional transportation policy. After all, "the Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.'" *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U.S. 502, 514 (1942).

Eight judges have already weighed this record in response to appellant's claims that their interests are vitally affected. None has been persuaded.

Appellant goes on to argue that:

> It is of great importance to Port Authority bondholders that this Court decide that the repealer is unconstitutional, thus returning the security provided by the Covenant and restoring the market for the bonds. J.S. 15.

But, as was made clear above, this Court's decision is of little or no importance to bondholders. Neither the "security provided by the Covenant" nor the "market for the bonds" was impaired by repeal. Appellant's selective presentation of the facts cannot mask the reality—the courts below found against it on these facts after extensive consideration. And the record fully supports those findings.

The trial court's conclusion that "few, if any, members of the investment community ever analyzed closely the actual effect of the 1962 covenant upon bondholder security," A90, is amply supported by the litigated record. Despite that finding, however, appellant continues its practice of asserting as true propositions for which there is no evidentiary support, such as that the covenant was "absolutely necessary to induce the investing public into

continuing to buy Consolidated Bonds," J.S. 13, or that the limitation was "an absolute *sine qua non*" of future Port Authority financing, J.S. 17. Appellant asserts that *it* stopped buying Port Authority bonds in 1961. J.S. 9, fn. Appellant had ample opportunity to offer evidence of its own actions but chose not to expose this assertion to cross-examination at trial. As a result, the record is wholly barren of evidence to support it.

If, contrary to the trial court's findings, investors really needed the reassurance of the covenant, investor concern should have been at its height in January 1962. At its previous session, the New York Legislature had adopted legislation containing no covenant and requiring the Authority to take over the Hudson & Manhattan. A71. Dun and Bradstreet, taking note of this, nonetheless rated the Port Authority's prospects as "Superior," P-1, and the Nineteenth series was sold on January 4, 1962 without difficulty at an interest rate of 3½ percent. A89.

Between 1962 and May 1973, the Port Authority issued 20 series of Consolidated Bonds at interest rates ranging from 3¼ percent to 6⅝ percent. A91. Though the Port Authority was now operating a passenger railroad with substantial deficits and the covenant might or might not endure,[9] bondholder enthusiasm for Port bonds continued unabated.

In 1973, New Jersey and New York enacted legislation repealing the covenant with respect to bonds issued after May 10, 1973. A83-84. In June 1973, the Port Authority

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[9] Appellant's chief witness from the investment community, John Thompson, testified that he was aware at all relevant times that under certain circumstances a State may constitutionally abrogate its contracts and that other pledges had been repudiated. T. 315-6 to 316-10, 319-11 to 13.

issued its 40th series of Consolidated Bonds at an interest rate of 6 percent. Though the covenant did not apply, appellant exercised its discretion to buy $2,570,000 of 40th series bonds for its fiduciary accounts. T. 850-13 to 853-17.

In October 1973, as the gubernatorial race between Brendan Byrne and Charles Sandman was nearing resolution, the Port Authority issued $100 million of its 41st series of Consolidated Bonds. Stip., Ex. II. Though the covenant did not apply to these bonds and candidate Byrne had, as appellant claims, called for greater participation by the Authority in mass transportation, the bonds were sold at an interest rate of 5½ percent. In light of these undisputed facts, the trial court concluded:

> it is clear that the interest rates which the Authority has had to pay on non-affected bonds [the 40th and 41st series] was not materially affected by the absence of direct covenant protection. A92.

At the trial, appellant attempted to show that the repeal of the covenant adversely affected the secondary market for Port Authority bonds. After a careful evaluation of the live testimony and comprehensive documentary evidence submitted to him, the trial court concluded:

> The bottom line of plaintiff's proofs on this issue is simply that the evidence fails to demonstrate that the secondary market price of Authority bonds was adversely affected by the repeal of the covenant, except for a short-term fall-off in price the effect of which has now been dissipated insofar as it can be related to the enactment of the repeal. A93-94.

Notwithstanding this finding, appellant persists in claiming, J.S. 17, that there was a significant decline in the

market value of its bonds. But appellant neglects to advise the Court of the fact that at the time of trial (February 1975) the prices for bonds of the Port Authority of New York and New Jersey and of the Massachusetts Port Authority (an agency selected for comparison by appellant) bore exactly the same relationship to each other that they did when appellant's exhibits began (July 1973) and immediately prior to the repeal of the covenant (April 1974). A92-93.[10]

For its final argument, appellant maintains:

> The court below erroneously justified the violation of the impairment provisions of the Constitution by terming the retroactive repeal of the 1962 Covenant an exercise of the police power. J.S. 18.

The repeal legislation questioned in this case is of vital regional importance.[11] The dependence of the New York Metropolitan area, largely embraced by the Port District, on effective mass transportation is unique in the nation. The Port of New York and New Jersey is the nation's

---

[10] Appellant's claim of market disruption is similarly unfounded. J.S. 17. The trial court specifically considered the opinion testimony offered by plaintiff with respect to the alleged "thinness" of the market for Port Authority bonds. A92 and fn. 33. But appellant's evidence on this point was contradictory and internally inconsistent. See T. 93, 407, 728-29, 744-46.

[11] Appellant's suggestions, J.S. 6, 11, that the Legislatures acted precipitously in repealing the covenant is belied by the record. The 1971 legislative hearings are summarized at Stip., pp. 223-232, and some of the material presented at those hearings appears in Stip., Ex. VII. Relevant legislation was enacted in both States in 1971, in New York in 1972, in both States in 1973 and again in 1974. The New Jersey Senate held an information session on Port Authority mass transit bills in December 1972. Stip., pp. 253a-255.

greatest harbor because of its many navigable waterways; yet transporting people conveniently across and under those waterways into highly concentrated business districts is both necessary to the economic vitality of the region and difficult to accomplish. For decades, federal policies and outright subsidies have spurred private automobile ownership and use at the expense of public transportation systems that move people much more efficiently, particularly at peak hours. The consequent decline of the region's mass transportation network is now, and has long been, among its major economic problems.

Two developments of the 1970's, however, have given that problem entirely new dimensions. Automotive pollutants are now known to be principally responsible for the area's inferior air quality. The best available scientific evidence is that our citizens' health is being impaired by the presence of levels of carbon monoxide and other auto-related pollutants far in excess of federally-mandated levels established pursuant to the Clean Air Act Amendments of 1970.[12] Both states are under federal pressure to reduce pollution by imposing restrictions on driving; the restrictions, such as limits on daytime delivery of goods, are so serious that they would cause major economic dislocation. Everyone who has studied the problems agrees that more effective mass transportation must be part of the solution. Second, the Arab oil embargo, causing long lines at gas stations and restricted travel and economic activity within the States, and outright gun battles over fuel prices and allocations elsewhere, showed that

[12] In *Friends of the Earth* v. *Carey*, No. 75-7497 (2d Cir. April 26, 1976), the Court of Appeals noted that "the public of New York City is exposed to carbon monoxide pollution that has . . . climbed to over five times the federal health standards." Slip opinion at 3440.

the region's economy in the absence of mass transit alternatives could be shut down by persons and policies over whom the States have no control. Avoiding such energy dependence has become a major national policy; energy conservation is a central feature of that policy.

The great problems to which this legislation is addressed —public health, economic vitality, security in the event of emergency—are thus those central concerns of people that governments are primarily organized to address. Appellant's representation that the legislation was not enacted in pursuit of police power objectives is frivolous. Moreover, the basic goal of the two states, to permit a billion dollar bi-State transportation agency with a monopoly on regional interstate automotive crossings to utilize increased revenues derived from that traffic to support energy-conserving, less polluting alternatives, is an eminently sensible one. Appellant's principal witness has publicly urged the same policy of subsidizing mass transit at the expense of automobiles. S-4.

The narrow question on which the case turned below was whether the legislation was reasonable in view of the policy of contract protection mandated by both State and Federal Constitutions. And every judge that addressed the question concluded that the ends sought by repeal were vitally important and that bondholder interests were not materially affected.

The Suggestion That the Court Note Probable Jurisdiction and Defer Further Consideration is Without Merit.

This Court's jurisdiction turns only on whether the issues presented are substantial. A state statute was upheld by the highest court of the State in the face of a properly raised federal claim. 28 U.S.C. §1257(2).

Appellant suggests that this Court might note probable jurisdiction, and hold disposition until the conclusion of related New York litigation. That would cause further delay in the State's ability to meet the urgent problems that animated repeal more than two years ago. The vital importance of freeing the Port Authority to perform its proper role in transportation as quickly as possible has been recognized both by the political branches of State government and by the State judicial branch, which granted this case expedited treatment.

Moreover, this delay would serve no useful purpose. Appellant's New York action has no independent vitality and has in fact lain dormant since its commencement by appellant in 1974. Its resolution turns entirely on the federal issues that have been fully litigated in this case. To suggest that the New York litigation will provide an additional record or might resolve the lawsuit fully on an adequate state ground is mistaken.

New York follows the modern rule that estops a party from relitigating issues when (a) the issues are identical and decisive and (b) a full and fair opportunity to contest the decision was provided. *Schwartz* v. *Public Administrator,* 24 N.Y.2d 65, 298 N.Y.S.2d 955, 246 N.E.2d 275 (1969). The federal issues have, of course, been fully litigated in this case. All bondholders were included in the class before the New Jersey court. There will be no independent construction of federal law.

With the federal issues resolved, the New York law suit is meritless unless there is some nonfederal basis for declaring the repeal invalid under the New York State Constitution. The contention that any such basis exists is frivolous and appellant cites no case in support of its position. Unlike the New Jersey Constitution, the New York Constitution has no provision explicitly protecting contract rights. New York jurisprudence on issues of contract protection turns entirely on the meaning of the federal Constitution. See, *e.g., Gelfert* v. *National City Bank,* 313 U.S. 221 (1941); *Matter of Farrell* v. *Drew, supra,* 19 N.Y. 2d 486, 281 N.Y.S. 2d 1, 227 N.E. 2d 824 (1967).

It is a hopeless task for appellant to conjecture some basis for believing that a New York state court might find the covenant's repeal a State constitutional violation, even though it is acting on the assumption that the federal mandates have been complied with. To be sure, New York has due process clauses, New York Const., Article 1, sections 6 and 7. But, research discloses no New York cases remotely suggesting that a modification of contract rights permissible under the federal Constitution would violate these provisions of the New York Constitution. A legislative alteration of contract rights that survives analysis under the federal contract clause does not warrant independent analysis under the federal due process clause. See *Veix* v. *Sixth Ward Building & Loan Ass'n of Newark,* 310 U.S. 32, 41 (1940). New York law holds precisely the same thing. See *Twentieth Century Association, Inc.* v. *Waldman,* 294 N.Y. 571, 582, 63 N.E.2d 177, 180 (1945).

CONCLUSION

For the foregoing reasons, appellees respectfully request the Court to dismiss this appeal for want of a substantial federal question.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1975

Nos. 1687, 1712

UNITED STATES TRUST COMPANY OF NEW YORK, ETC.,
Appellant,

—against—

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Appellees.

DANIEL M. GABY,
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—against—

THE PORT OF NEW YORK AUTHORITY, ET AL.,
Appellees,

and

UNITED STATES TRUST COMPANY OF NEW YORK,
Intervenor.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS APPEAL OF DANIEL M. GABY

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UNITED STATES TRUST COMPANY OF NEW YORK,

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS APPEAL OF DANIEL M. GABY

Pursuant to Rule 16 of the Revised Rules of this Court The Port Authority of New York and New Jersey *et al.* move to dismiss the appeal by Daniel M. Gaby from the judgment of the Supreme Court of New Jersey on the ground that the issue raised by the appeal does not present a substantial federal question.

Brief in Support of Motion

Statement

It is the Port Authority's position that the appeal by Daniel M. Gaby should be dismissed summarily for want of a substantial federal question. The only issue attempted to be raised by the appeal is the contention that the 1962 statutory covenant between the States of New Jersey and New York and Port Authority bondholders, partially restricting the amount of monies which the Authority may spend for passenger rail transit, required specific Congressional consent under the Constitution's Compact Clause (Art. 1, § 10, Cl. 3). It is evident, however, that such claim is clearly erroneous in view of this Court's decision in *Courtesy Sandwich Shop et al.* v. *Port Authority et al.*, 12 N.Y.2d 379, 190 N.E.2d 402, *appeal dismissed for want of a substantial federal question*, 375 U.S. 78, *reh. den'd*, 375 U.S. 960 (1963). The *Courtesy* case held that when Congress consented to the 1921 Port Compact and the 1922 comprehensive plan it consented to future bi-State action in furtherance of Port purposes. The courts below—the New Jersey Supreme Court and the New Jersey Superior Court—did not reach the issue of the constitutionality of the 1962 covenant in view of their decision in the related litigation brought by the United States Trust Company against the State of New Jersey upholding the validity, under the Contract Clauses of the Federal and New Jersey Constitutions, of the 1974 New Jersey legislation repealing the 1962 covenant.

Appellant's claim that the covenant required specific Congressional consent since it was not in furtherance, but rather in derogation, of the Port Authority's original purposes is frivolous. It ignores, as established herein and found by both courts below, that the primary purpose for the Port Authority's creation was not the development of passenger rail facilities. Furthermore, as noted by the trial court, the covenant was designed to further the Au-

thority's Congressionally consented-to powers by enabling it to enter, for the first time, the field of deficit rail transit without losing its historic and essential ability to attract private investment in its obligations.

Counter-Statement of Facts

A. The primary purpose for the creation of the Port Authority was to solve problems relating to the movement of freight.

Adoption of the 1921 Compact creating the Port Authority was the direct result of the demonstrated inadequacies of the Port of New York's freight terminal facilities during World War I and the controversy between New Jersey and New York interests over allegedly discriminatory freight rates and practices which culminated in the *New York Harbor Case*, 47 I.C.C. 643 (1917). There, the I.C.C., in declining to disturb the uniform freight rates then being charged throughout the bi-State Port of New York, ventured the opinion that the solution to the port's problems "is to be found, not in a change in the rate adjustment, but in the united efforts of the people of the district and the carriers toward the improvement of conditions in which their interests are mutual." 47 I.C.C. 643, 734. In 1917 both New York and New Jersey appointed commissions to study the Port problem and to make appropriate recommendations. After a three-year study, the two commissions, which had organized themselves as a single body, known as the New York, New Jersey Port and Harbor Development Commission, rendered a comprehensive 495 page report containing the most complete study ever made of the history, conditions, and freight facilities in the Port of New York.[1]

The Report recommended a comprehensive plan for the development of the Port of New York which, as found by

[1] New York, New Jersey Port and Harbor Development Commission, Joint Report, 1920.

the trial court, "addressed itself exclusively to the transportation and distribution not of persons but of freight and cargo by rail, and to a lesser extent by ship and motor truck." [2] The Report also recommended the adoption of a compact between the States establishing a bi-State Port of New York District and creating a single Port Authority.

The following year the Port Authority was created pursuant to an interstate compact between the States of New Jersey and New York which was consented to by Congress.[3] The Compact conferred upon the Port Authority "full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said [Port of New York] district . . ." These powers, however, were not to be exercised by the Port Authority until the Legislatures of both States approved a comprehensive plan for the development of the Port (Article VI).

Thus, although it is true, as appellant claims, that the term "transportation facility" is defined in Article XXII of the Compact to include

> "railroads . . . designed for use for the transportation or carriage of persons or property"

the crucial point is that Article VI, by its express terms, provides nothing more than statutory authorization for possible future Port Authority operation of terminal and transportation facilities and does not impose a duty on the Port Authority with respect to developing such facilities.

Although the two States vested their new bi-State agency with broad general powers, they did not surrender

[2] The trial court went on to point out that: "In its 474 pages, plus appendices, the only significant discussion of passenger traffic in the Report is contained in the section dealing with ferries and vehicular tunnels." (Gaby Appendix, p. 48).

[3] Ch. 151, Laws of N.J., 1921, N.J.S.A. 32:1-1 *et seq.*; Ch. 154 Laws of N.Y., 1921, McKinney's Unconsol. Laws § 6401 *et seq.*; consented to by Congress, Pub. Res. 17, 67th Cong., 1st Sess., 42 Stat. 174 (1921).

any of their sovereign powers over Port development. The Compact fully preserves their right to act in this field, either directly or through their other agencies. The Compact not only prevents the Port Authority from taking any property owned by the States, their agencies, and political subdivisions, without consent (whether or not the property is devoted to Port purposes), but also specifically declares that nothing therein shall "impair the powers of any municipality to develop or improve Port and terminal facilities." (Articles VI and IX).

The Port Authority's first concern was working out the details of a comprehensive plan for the future development of the Port District. The plan which it recommended—a plan substantially similar to that advanced by the New York, New Jersey Port and Harbor Development Commission—was adopted by the two States in a 1922 interstate compact to which Congress consented.[4]

The 1922 comprehensive plan which the States enacted and to which Congress consented is primarily concerned with railroad freight distribution. As found by the trial court, it has absolutely nothing to do with passenger operations:

> "In the Plan, like the *Report* upon which it was based, unification of terminal operations and facilities, consolidation of shipments, adaptation and coordination of existing facilities, improvement of commercial rail, truck and water facilities, and other freight handling improvements are set forth as principles to govern the development of the Port Authority. The Comprehensive Plan proposed to establish direct rail freight connections between New Jersey and Manhattan to furnish 'the most expeditious, economical and practical

[4] Ch. 9, Laws of N.J., 1922, N.J.S.A. 32:1-25 *et seq.*; Ch. 43, Laws of N.Y., 1922, McKinney's Unconsol. Laws § 6541 *et seq.*; consented to by Congress, Pub. Res. 66, 67th Cong., 2nd Sess., 42 Stat. 822 (1922).

transportation of freight especially meat, produce, milk and other commodities comprising the daily needs of the people.'" (Gaby Appendix, p. 50)

The plan adopted by the two States and consented to by Congress was not only designed to meet the commercial needs of the Port in times of peace but also the needs of the United States in times of war. Thus Congress, in the Joint Resolution granting consent to the comprehensive plan, declared:

"... the carrying out and executing of the said plan will better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation. ..." 42 Stat. 822 (1922).[5]

In its *per curiam* opinion, the New Jersey Supreme Court also specifically rejected appellant's contention that the Port Authority had a duty under the Compact and comprehensive plan to effectuate mass transit projects:

"That the Authority's involvement in transportation matters was contemplated is obvious from a reading ... of the Comprehensive Plan as well as the Compact; but it requires a quantum leap to derive therefrom a mandate (as distinguished from the power) to develop a plan for a particular kind or method of transportation, to wit, mass transit." (Gaby's Appendix, pp. 5-6)

[5] As found by the New Jersey Supreme Court in an earlier case, *Port of New York Authority* v. *City of Newark*, 20 N.J. 386, 395 (1956),

"[O]ne of the foremost considerations in the minds of the respective Legislatures when they created the Port of New York Authority and adopted the Comprehensive Plan was the development and maintenance of the Port so that it could be used efficiently by our armed forces in time of war."

Pursuant to the 1921 Compact, the 1922 comprehensive plan statutes and subsequent amendments and supplements thereto, the Port Authority presently owns and/or operates the Holland and Lincoln Tunnels; the George Washington, Outerbridge, Bayonne and Goethals Bridges; Newark and New York International Airports, Teterboro and LaGuardia Airports; two heliports; Port Newark, the Hoboken Port Authority Marine Terminal, the Elizabeth Port Authority Marine Terminal, the Columbia Street Marine Terminal, the Erie Basin Port Authority Marine Terminal and a Mid-Manhattan Consolidated Passenger Ship Terminal; the Port Authority Bus Terminal, the George Washington Bridge Bus Station, the Newark and New York Union Motor Truck Terminals; the Port Authority Trans-Hudson rail system [operated by the Port Authority's wholly-owned subsidiary, the Port Authority Trans-Hudson Corporation (PATH)] and the World Trade Center.

B. The Port Authority was created to be a self-supporting agency of State government.

The "WHEREAS" clauses of the 1921 Compact creating the Authority recognized that the development of the port "will require the expenditure of large sums of money and the cordial cooperation of the states of New York and New Jersey in the encouragement of the investment of capital. ..." Article VI authorized the Port Authority "to borrow money and secure the same by bonds or by mortgages." Article VII provided that "The port authority shall not pledge the credit of either state except by and with the authority of the legislature thereof." And Article XV provided that "Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures," the States will each appropriate up to $100,000 a year. Thus, the 1921 Compact, to which Congress consented, envisioned the Port Authority's role to be that of a self-supporting agency of State government.

The Compact and the comprehensive plan statutes clearly contemplated that the Authority would finance each of its projects by the sale of revenue bonds which would be repaid by user charges. The Authority's first annual report to the two Legislatures discusses the financial methods available to it to implement the comprehensive plan. The report noted that because of the Authority's lack of access to tax funds,

> "It must secure capital from investors on securities to be based on the properties it constructs, purchases or leases in carrying out its plans." (Report with Plan for the Comprehensive Development of the Port of New York, 1921, p. 23).

The report emphasized that

> "The soundness of the enterprises must be proved by economic data, therefore the work can be undertaken only when investors have been satisfied that economic justification exists. The cost of service must necessarily provide for operation and maintenance and for interest upon and amortization of the bonds or other securities." (p. 23).

In 1924 Governor Alfred E. Smith of New York, once a Commissoner of the Port Authority, described the Authority as providing a

> "thoroughly modern method of financing public improvements without burden to the taxpayers of the State, maintaining the State's ownership, yet financing on the basis of the economic value of the improvement itself." Public Papers of Alfred E. Smith, 1924. Annual Message to the Legislature, p. 39.

In the same year that Governor Smith stated his approval of the authority technique, the United States War Department refused to sell the Hoboken Shore Line Railroad, which it acquired during World War I, to the Port Authority on the ground that all the Authority could offer was $1 million of its own bonds, secured by nothing more than the Railroad's income.[6] The Port Authority could offer nothing more for this freight railroad which was a part of Belt Line No. 13 of the comprehensive plan statutes,[7] because, as we have seen, the 1921 Port Compact expressly denied it the power to pledge the credit of either State without specific State consent. Art. VII, Ch. 151, Laws of N.J. 1921; Ch. 154, Laws of N.Y., 1921.

As a result of the War Department's refusal to accept Port Authority bonds in payment, the Authority was unable to acquire the Shore Line Railroad.

Similar financial difficulties in the middle 1920's threatened to prevent the Authority from constructing its legislatively authorized interstate bridges. To overcome these difficulties, the Legislatures adopted a plan under which the States advanced approximately 25% of the total estimated cost of construction for each bridge, while the Port Authority financed the remaining 75% of their cost through the sale to private investors of bonds secured by the entire net revenues of each particular bridge. The States' advances were a junior obligation on those revenues. Arthur Kill Bridge financing legislation, Ch. 37, Laws of N.J., 1925; Ch. 210, Laws of N.Y., 1925. George Washington Bridge financing legislation, Ch. 6, Laws of N.J., 1926; Ch. 761, Laws of N.Y., 1926. Bayonne Bridge financing legislation, Ch. 3, Laws of N.J., 1927; Ch. 300, Laws of N.Y., 1927, as amended. In addition to these State advances, the Legislatures entered into statutory covenants with Port Authority bondholders. Thus § 5 of the Arthur Kill Bridge financing legislation provides that:

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[6] The difficulties encountered by the Port Authority in its attempted acquisition of this railroad are recounted in E. Bard, *The Port of New York Authority* 140-154 (Columbia Univ. Press, 1942).

[7] § 5, Ch. 9, Laws of N.J., 1922; § 5 Ch. 43, Laws of N.Y., 1922.

"The State of New Jersey (the State of New York by appropriate legislation concurring herein) does pledge to and agree with those subscribing to the obligations issued by the Port Authority for the construction of the said bridges and incidental purposes that the State will not authorize the construction or maintenance of any other highway crossings for vehicular traffic of [sic] the waters of the Arthur Kill, between the two States in competition with the said bridges, nor will it limit or alter the rights now vested in the Port Authority to establish and levy such charges and tolls as it may deem convenient or necessary to produce sufficient revenue to meet the expense of maintenance and operation and to fulfill the terms of the obligations assumed by it in relation to such bridges until the said obligations, together with interest thereon, are fully met and discharged."

Similar provisions are found in the financing legislation for the George Washington and Bayonne Bridges. *Id.*

The early traffic across these bridges, however, fell below predictions and it became increasingly difficult for the Authority to meet debt service requirements on its bridge bonds. A distinct possibility of default developed. In 1930-1931, the States acted to prevent a possible default and to expand the Authority's ability to finance new projects by designating it as their sole agent for future interstate vehicular crossings, Ch. 4, Laws of N.J., 1931; Ch. 47, Laws of N.Y., 1931, after transferring the Holland Tunnel to it. Ch. 247, Laws of N.J., 1930; Ch. 421, Laws of N.Y., 1930. The 1931 Bridge and Tunnel Unification Acts likewise contained covenants by the Legislatures against any impairment of the Port Authority's power to set tolls as well as guarantees to Port Authority bondholders that the States would not authorize vehicular crossings within the statutorily defined Port District in competition with those of the Authority. § 12, Ch. 4, Laws of N.J., 1931; § 12, Ch. 47, Laws of N.Y., 1931.

In addition, as part of the States' 1931 legislative program, the Port Authority was directed to pool statutorily defined revenues in a General Reserve Fund, in an amount equal to 10% of outstanding Port Authority indebtedness. This fund has been pledged by the Port Authority to bondholders so that their security is not limited to the revenues of individual facilities. Ch. 5, Laws of N.J., 1931, as amended by Ch. 197, Laws of N.J., 1945; Ch. 48, Laws of N.Y., 1931, as amended by Ch. 163, Laws of N.Y., 1945. This pooling arrangement, using the revenues produced by the Holland Tunnel, enabled the Port Authority to honor its obligations on bridge bonds and on those for Inland Terminal No. 1 even though deficit operations were initially involved. Later, pooling permitted the Port Authority to embark upon a refunding program of its prior special issues in connection with the financing of the Lincoln Tunnel.

The Port Authority's financial position improved as its various facilities—including such post-war facilities as airports—achieved self-supporting status. The 1947 air terminal statutes, like the bi-State bridge and tunnel legislation, contain statutory covenants and guarantees to investors in Port Authority securities. Ch. 43, Laws of N.J., 1947; Ch. 802, Laws of N.Y., 1947. Section 12 of this legislation provides that "The two States covenant and agree with each other and with the holders of any bonds of the Port Authority issued or incurred for air terminal purposes" that so long as any such bonds remain outstanding "the two States will not . . . diminish or impair the power of the Port Authority to establish, levy and collect landing fees, charges, rents, tolls or other fees, in connection therewith [air terminals]."

C. The Port Authority's role in solving the Port District's commuter rail problem prior to 1960.

Following World War I, an increase in population in suburban areas of the Port District brought with it a seri-

ous suburban transportation problem. While New York State was primarily concerned with the improvement of rapid transit facilities connecting New York City and Westchester County (Ch. 591, Laws of N.Y., 1921), New Jersey's problem was trans-Hudson. A solution to the trans-Hudson problem involved not only improved rail facilities within New Jersey, but also speedier and more convenient access to Manhattan.

The New Jersey Legislature first focused on the commuter rail problem in 1922 when it established the North Jersey Transit Commission to study and report upon a plan for providing a comprehensive scheme of rapid passenger transit between northern New Jersey communities and New York City. Ch. 104, Laws of N.J., 1922. Significantly the preamble to this act noted that the Port Authority's comprehensive plan legislation enacted earlier that year, "does not include the problem of passenger traffic in the territory covered by said port development plan."

In 1927 the New Jersey Legislature attempted to supplement the Port Authority's comprehensive plan in order to involve it in passenger rail problems. However, although the necessary concurrent legislation was passed by the New York Legislature the following year, it was vetoed by Governor Alfred E. Smith. The Governor's veto message expressed his belief that the solution of other Port problems was more deserving of Port Authority attention, especially the freight distribution problem which, in his words, "always has been the main object and purpose of the Port of New York Authority."[8] As the trial court noted, "Governor Smith's veto to all intents and purposes ended any legislative effort to involve the Port Authority in an active role in commuter transit for the next thirty years." (Gaby's Appendix, p. 61)

[8] Public Papers of Governor Alfred E. Smith of 1928, 187-88 (L.B. Lyon Co., 1938).

During this thirty year period there was a host of studies by both public and private agencies dealing with this problem. *Ibid.* In commenting on the failure of these efforts, the trial court aptly characterized them not as "failures of purpose, effort or imagination, but the failure to find the source of funds required to implement any plan." *Ibid.*

In the 1950's, as the financial plight of the commuter railroads worsened, the States considered what role, if any, the Port Authority should play in dealing with this emerging problem. The initial answer of the States was the Port Authority commuter car program. In 1959 they enacted concurrent legislation providing that "Upon the election by either State . . . the Port Authority shall be authorized and empowered" to purchase and own railroad cars for the purpose of leasing them to commuter railroads within the electing State. § 3, Ch. 25, Laws of N.J., 1959; § 3, Ch. 638, Laws of N.Y., 1959.

In implementing this program, the States fully recognized the financially hazardous nature of passenger rail activity for an agency such as the Port Authority which was proscribed from both levying taxes and pledging the credit of New York or New Jersey and therefore must be self-supporting. Consequently, although Port Authority expertise was utilized and the Authority became deeply involved in the purchasing and leasing of railroad cars to New York commuter railroads, a method was developed to permit Port Authority participation in this field without jeopardizing its financial ability to continue its other activities as directed by the two States. The commuter railroad car program authorized by the States and utilized by the State of New York is founded upon obligations issued by the Port Authority but which, unlike any other Authority obligations before or after, are guaranteed by the State of New York under authority of a specific amendment to the New York State Constitution. Article X, Section 7. To date,

this program has resulted in the acquisition of 467 air-conditioned passenger cars and eight diesel electric locomotives for use on the Penn-Central and Long Island railroads. *See* The Port Authority of New York and New Jersey 1972 Annual Report to the Governors and Legislatures of the States, p. 15.

In view of appellant's allegations that the Port Authority has the duty of planning and effectuating a passenger rail transportation system for the Port District, it is significant that at the very time the States of New Jersey and New York imposed on the Authority the very limited duties involved in the commuter car program, they created a wholly new bi-State agency, the New York-New Jersey Transportation Agency, to be responsible for their mass transit problems. Ch. 13, as amended by Ch. 14, Laws of N.J., 1959; Ch. 420, Laws of N.Y., 1959. This agency unlike the Port Authority, was specifically created for the purpose of serving

> "as a public agency of the states of New York and New Jersey in dealing with matters affecting public mass transit within and between the 2 states." N.J.S.A. 32:22A-6.

Congress consented to the bi-State legislation creating this mass transportation agency.[9] 73 Stat. 575 (1959). Thus, neither the States of New Jersey and New York, nor Congress, could have believed, as appellant would have this Court believe, that there was already in existence prior to 1959, a Congressionally-consented-to bi-State agency created primarily to deal with mass transit problems in the Port of New York District.

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[9] The Compact provided that the agency was to continue in existence until June 13, 1961, but that its existence could continue thereafter as concurrent legislation might provide (Article 4, § 4.6). In 1961 the Legislatures of both States extended the agency's duration to June 30, 1966. Ch. 55, Laws of N.J. 1961; Ch. 273, Laws of N.Y. 1961. There was no subsequent legislation extending the existence of the agency beyond 1966.

D. The 1962 Covenant enabled the self-supporting Port Authority, for the first time, to enter the field of deficit rail transit while maintaining bondholder confidence.

In 1960, the New Jersey Senate created a bi-partisan committee to conduct "a full and unlimited investigation" of the Port Authority. Specifically, the Committee was "authorized, empowered and directed to study the entire financial structure and operations" of the Authority, and to determine "whether or not the said Port of New York Authority is fulfilling its statutory duties and obligations". Senate Resolution No. 7, 1960. (The Committee was reconstituted under Senate Resolution No. 7, 1961.)

One of the major subjects investigated was the proper Port Authority role in the commuter transit problem. The Committee commenced its analysis of this issue at its first public hearing on September 27, 1960. At that time the Authority's then Executive Director submitted to the Committee a 1958 statement that the Port Authority's Commissioners had prepared reviewing the background of the mass transit problem and its accompanying deficits "as well as a complete analysis of the financial and legal reasons why the Port Authority as a self-supporting agency could not take on the deficits of the commuter railroads in the metropolitan region". Public Hearings, September 27, 1960, p. 14.

The Executive Director noted that since the 1958 statement had been prepared, the New Jersey State Highway Commissioner, who had within his jurisdiction the State Division of Railroad Transportation, had recommended that the New Jersey Legislature adopt the so-called service contracts by which the State would subsidize the continued operation of commuter railroads and in addition that the Port Authority should participate directly in a program of commuter railroad assistance. Direct Port Authority participation in the program however, was limited to the interstate Hudson and Manhattan Railroad system.

Of all the commuter railroads, the Hudson and Manhattan's plight had long been the worst. In 1954, its creditors had forced it into reorganization under the Bankruptcy Act on the ground of insolvency. The reorganization proceeding was designed to lay the groundwork for the railroad's ultimate abandonment by its private owners. This was virtually achieved in 1959 when the Federal reorganization court left it with enough cash to continue operations for the ensuing two years but not enough money to provide needed capital improvements. *In Re Hudson & Manhattan Railroad Co.*, 174 F. Supp. 148 (S.D.N.Y. 1959), *aff'd sub nom., Spitzer* v. *Stichman*, 278 F.2d 402 (2d Cir. 1960).

As a result of its investigation, the New Jersey Senate Committee filed a detailed report, "Report of Senate Investigating Committee under Senate Resolution No. 7 of the year 1961". The Report fully sets forth the legal and practical restrictions on Port Authority financing as well as the clear legislative intent behind the 1962 covenant of providing a viable and realistic means of enabling the Port Authority to finance the acquisition, rehabilitation and operation of what would become the PATH system, with its continuing deficits, while continuing to maintain bondholder confidence.

The Report initially analyzed the nature of the Port Authority, noting that:

> "The power to tax or pledge the credit of either the State or any municipality was withheld. As a result the new agency was required to establish its facilities solely with borrowed money and the borrowing could be accomplished only in convincing prospective bondholders that the projects would be self-supporting and would produce sufficient revenues from their tolls and other charges to meet all of the Port Authority's obligations to the bondholders within the reasonable margin of safety coverage. The compact reserved to each

> State a right to provide a veto power by its Governor and each State has so provided. Detailed additional powers and the delineation of specific projects were expressly reserved for subsequent bi-state legislative authorization." p. 8.

With regard to whether the Port Authority was performing its statutory duties and obligations the Report concluded that:

> "There is no doubt in the minds of the members of the committee that the 2 States have realized their objectives in the creation of the Port Authority. They have procured vast public improvements without charge to the general taxpayers and have created a vital organization capable of continuing to provide such projects as the two States desire and which are of common benefit to both of them. Most of the serious writers of government techniques have pointed to the Authority as one of the most successful agencies of state government." p. 9.

As far as the financing of Port Authority facilities was concerned, the Committee concluded that "the basic framework and philosophy of the Port Authority with respect to its financing policies and its adherence to the principle of administering self-supporting facilities are soundly conceived." p. 12. Quoting from the report of certified public accountants retained by the Committee who investigated all aspects of the Port Authority's finances and financial structure, the Committee noted that

> " 'The contributors of the Authority's capital neither own nor operate the entity financed with their money. Since the bondholders do not exercise direct control over the Authority they have protected their investment by requiring certain covenants and guarantees as a prerequisite to lending their money.' " p. 14.

Turning specifically to the problem of the Port Authority's involvement in passenger rail transit and the history

of the 1962 bi-State legislation containing the statutory covenant, the Committee pointed out:

> "During 1961, the New York State Legislature enacted legislation which empowered the Port Authority to proceed with the acquisition, modernization and operation of the Hudson and Manhattan Railroad and coupled in the same bill an authorization for the Authority to undertake the development of a World Trade Center on the east side of lower Manhattan. *The bill contained no statutory covenant to protect Port Authority credit against future transit responsibilities which would divert its railroad deficits to revenues and reserves pledged to its bondholders. This legislation proved unacceptable to New Jersey because of the manner in which these two projects were 'packaged' in one statute and because the absence of such a statutory covenant, in our judgment, endangered the future utility of the Port Authority to the 2 States.* Accordingly, an impasse developed in 1961 between the States of New York and New Jersey on the appropriate form of legislation for these two projects." (Emphasis added.)
>
> "This Committee was convinced that the credit problem which had been pointed out by the Port of New York Authority was a valid and real one and that the Port Authority could not assume responsibility for the complete burden of the deficit-ridden commuter railroad problem in the area of northern New Jersey and New York. If the Port Authority were to receive such unrestricted responsibility, there is no question but that its sound credit position would be seriously impaired, if not destroyed, and it would become impossible for the Authority to continue to move forward either with such a rail program or with other vital transportation and terminal facilities and other facilities of commerce desired by the 2 States in continuing the Port Authority's tradition as a public agency." pp. 23-24.

The Report then goes on to discuss how "as a result of lengthy discussions" a program was worked out by the two States, whereby the Port Authority would acquire the Hudson and Manhattan Railroad and effectuate a World Trade Center on the west side of Manhattan and such bi-State legislation would contain a provision

> "Limiting by a constitutionally-protected statutory covenant with Port Authority bondholders the extent to which the Port Authority revenues and reserves pledged to such bondholders can in the future be applied to the deficits of possible future Port Authority passenger railroad facilities beyond the original Hudson & Manhattan Railroad system." p. 24.

The Report noted that

> "It was with a great deal of satisfaction that the full membership of this Committee sponsored the legislation authorizing the Port Authority to proceed with this [the 1962 H&M-WTC] project, one of the most important statutes ever to be enacted by the New Jersey State Legislature. On February 13, 1962, both Houses of the Legislature passed this Bill by unanimous votes (with one abstention in each House) and Governor Hughes signed the Bill on the same day." pp. 25-26.

Thus, it was on the basis of this Committee's recommendation that the New Jersey Legislature unanimously adopted the 1962 Hudson Tubes—World Trade Center legislation which contains the statutory covenant here in question.[19]

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[19] Governor Rockefeller, in his message approving the 1962 Hudson Tubes-World Trade Center legislation in New York, stated that:

> "To preserve the Port Authority's credit strength the bill includes a covenant by the two States that additional deficit

The Port Authority, through its wholly owned subsidiary, The Port Authority Trans-Hudson Corporation (PATH), began its operation of the old Hudson-Tubes on September 1, 1962 and initiated a long-range, multi-million dollar rehabilitation and modernization program. To date, the Port Authority has invested over $250 million in the acquisition, rehabilitation and modernization of PATH and its cumulative operating deficits since 1962 have totaled nearly an additional $220 million. 1975 Port Authority Annual Report, p. 13.

E. The hearings before the House of Representatives' Committee on the Judiciary.

The proposed covenant was also discussed during the course of lengthy hearings in 1960 before a Subcommittee of the House of Representatives' Committee on the Judiciary, the Committee which under the rules of the House is concerned with interstate compacts. *See* Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 86th Cong. 2nd Session (1960) p. 2. At that time, this Congressional subcommittee was making a detailed investigation into, among other matters, the Port Authority's financial structure.

During these hearings, the Port Authority's then Executive Director, both referred to and answered questions relating to the covenant in his live testimony (*Id.* at 1559-1562) and submitted to the Sub-committee the statement discussing the covenant which he had presented to the New Jersey Committee less than two months earlier. This statement was reprinted in full by the House Judiciary Sub-committee in the official report of its hearings. *Id.* at 1594-1603.

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financing of future railroad projects will only be undertaken within the financial limits set forth in their covenant." New York State Legislative Annual—(1962) pp. 322, 324.

The knowledge of the Judiciary Committee concerning the 1962 statutory covenant is particularly significant since during the very period in question the Chairman of the Committee, Congressman Emanuel Celler of New York, who was conducting the investigation, had introduced into the House of Representatives, in February, 1960, a bill providing that:

> "all legislation hereafter enacted by the compacting States amending or supplementing this compact [the 1921 Port Authority Compact] shall not become effective until approved by the Congress." H. J. Res. 615.

This bill was never enacted into law. It died in Congressman Celler's own Judiciary Committee.

Significantly, although the House Judiciary Committee was very much concerned with the issue of Congressional consent, at no time during the course of its lengthy hearings was it even suggested that the proposed statutory covenant might require additional Congressional consent in order to be effective.

ARGUMENT

No substantial federal question is involved on this appeal since it is clear that specific Congressional consent was not required for the 1962 statutory covenant which appellant is here challenging.

The New York Court of Appeals, in *Courtesy Sandwich Shop et al.* v. *Port Authority et al.*, 12 N.Y.2d 379, 190 N.E. 2d 402, *appeal dismissed for want of a substantial federal question*, 375 U.S. 78, *reh. den'd* 375 U.S. 960 (1963), held that when Congress consented to the 1921 Port Compact and to the 1922 comprehensive plan statutes it consented to future bi-State action in furtherance of port purposes. More specifically, the court ruled that no

additional Congressional consent was necessary for the 1962 bi-State Hudson Tubes-World Trade Center legislation, which included the 1962 covenant here in question, since

> "assuming consent to be required for this sort of concurrent action, the congressional consent originally given in 1921 and 1922 to the bi-State compact creating the Port Authority expressly contemplated such further co-operative legislation in furtherance of port purposes as was here accomplished. (Pub. Res. No. 17, 67th Cong., 1st Sess., 42 U.S. Stat 822.) Among the Articles of Agreement consented to were articles III, VII and VI, which created the Port Authority with the powers enumerated plus 'such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other'. Similarly, article XI, following the agreement for an initial comprehensive plan in article X, provides that the Port Authority should 'from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two states, they shall be binding upon both states with the same force and effect as if incorporated in this agreement.' Chapter 209 clearly falls within the congressional consent given to the articles contemplating the grant to the Port Authority of additional powers within the framework of the compact." 12 N.Y.2d 379, 391, 190 N.E.2d 402, 406.

In so holding, the court relied on the fact that when Congress consented to the 1921 Compact, it consented "to the said agreement and to each and every part and article thereof." 42 Stat. 174 (1921). Article III, which created the Port Authority, provided that it should have not only "the powers and jurisdiction hereinafter enumerated," but also

> "such other and additional powers as shall be conferred upon it *by the legislature of either state concurred in by the legislature of the other* • • •." (Emphasis added.)

Similarly, Article VII, after an enumeration of specific delegated powers in Article VI for transportation and terminal facilities, provided:

> "The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it *from time to time by the action of the legislature of either state concurred in by the legislature of the other.*" (Emphasis added.)

Both Articles III and VII, themselves specifically consented to by Congress, thus clearly provide that additional powers and duties in furtherance of port purposes might be delegated by the two States acting together without further Congressional consent.

Likewise, Article XI provided that the Port Authority should

> "from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved *by the legislatures of the two states*, they shall be binding upon both states with the same force and effect as if incorporated in this agreement." (Emphasis added.)

Also directly in point is § 7 of the 1922 comprehensive plan legislation, which was also consented to by Congress, and which provides that

> "The right to add to, modify or change any part of the foregoing comprehensive plan is reserved *by each state, with the concurrence of the other.*" (Empha-

sis added.) Ch. 9, Laws of N.J., 1922; Ch. 43, Laws of N.Y., 1922.[11]

The actual decision rendered by the New York Court of Appeals in *Courtesy* was the "entry of a judgment that chapter 209 of the Laws of 1962 is constitutional." 12 N.Y. 2d 379, 400, 190 N.E. 2d 402, 412. Chapter 209, together with its New Jersey equivalent, Chapter 8, contains the 1962 statutory covenant here under attack.

The appeal to this Court in *Courtesy* was dismissed for want of a substantial federal question, 375 U.S. 78 and a petition for rehearing was denied, 375 U.S. 960 (1963). If there ever was any doubt as to the meaning of such a decision, this Court made it clear in *Hicks* v. *Miranda,* 422 U.S. 332, 343 (1975) that a dismissal for want of a substantial federal question is a decision on the merits and, as such, constitutes binding precedent.

Therefore, unless the instant case is distinguishable from *Courtesy,* appellant's claim that the 1962 statutory

[11] Aside from the Port Authority Compact there are many other examples of Congressional consent to interstate agreements which expressly reserve to the compacting States the power to supplement the original compact by State action alone. Some examples are *New England Interstate Water Pollution Control Compact* (61 Stat. 682); *Western Regional Educational Compact* (67 Stat. 490); *La-Plata River Compact* (43 Stat. 796); and *Arkansas River Compact* (63 Stat. 145).

Moreover, there are many instances in which Congress has consented not just to amendments and supplements to existing agreements within the framework of their original scope but to wholly new interstate agreements yet to be drawn and identified only by subject matter in fields in which Congress wishes to encourage interstate agreements. Such blanket consents in advance to wholly new agreements are found, for example, for compacts dealing with forest and water conservation (16 U.S.C. § 552; 36 Stat. 961); navigation and flood control (33 U.S.C. § 567a; 49 Stat. 1490); offenses on waters forming state boundaries (33 U.S.C. § 11; 41 Stat. 1447); traffic safety (72 Stat. 635); comprehensive urban planning and agencies therefor (40 U.S.C. § 461(g); 88 Stat. 687); crime prevention and agencies therefor (4 U.S.C. § 111; 58 Stat. 575); and developing and operating airport facilities (49 U.S.C. § 1103a; 73 Stat. 333).

covenant requires specific Congressional consent should likewise be dismissed for want of a substantial federal question. Appellant, realizing this, attempts to argue that the statutory covenant involved in the instant case is in derogation of the purposes for which the Port Authority was created. His argument, however, lacks merit since it is evident that the covenant was enacted in furtherance, not in derogation, of the Port Authority's role as the States' joint or common agency to develop terminal, transportation and other facilities of commerce in the bi-State Port District. Thus the 1962 legislation expressly states that it is

> "in partial effectuation of and supplemental to the comprehensive plan heretofore adopted by the 2 said States for the development of the said port district". § 3, Ch. 8, Laws of N.J., 1962; § 3, Ch. 209, Laws of N.Y., 1962,

as well as

> "supplementary to the compact [the 1921 Port Compact] . . . and shall be liberally construed to effectuate the purposes of said compact and of the comprehensive plan heretofore adopted by the 2 States, and the powers granted to the port authority shall be construed to be in aid of and not in limitation or in derogation of any other powers heretofore conferred upon or granted to the port authority." § 17, Ch. 8, Laws of N.J., 1962; § 17, Ch. 209, Laws of N.Y., 1962.

The specific role of the covenant in further effectuating the Compact and comprehensive plan is demonstrated beyond doubt in the Report of the New Jersey Senate Committee which recommended inclusion of the covenant in the 1962 Hudson Tubes-World Trade Center legislation:

> "If the Port Authority were to receive such unrestricted responsibility [to operate deficit rail facilities] there is no question but that its sound credit position would be seriously impaired, if not destroyed, and it would

become impossible for the Authority to continue to move forward either with such a rail program or with other vital transportation and terminal facilities and other facilities of commerce desired by the 2 States in continuing the Port Authority's tradition as a public agency." Report, p. 24.

Thus, the 1962 statutory covenant did not strip the Port Authority of a pre-existing compact power, but, on the contrary, provided it, a self-supporting agency lacking access to tax resources, with a means of implementing, for the first time in its history, its authorization to develop and to operate rail passenger facilities. As found by the trial court, "The enactment of the 1962 covenant was indeed an attempt to satisfy an immediate public need to preserve the H&M as a viable public transportation system" (Gaby's Appendix, p. 106) and

> "the Legislature of 1962 concluded it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority". (Gaby's Appendix, p. 90)

The 1962 covenant, enacted by the Legislatures, was perfectly consistent with the earlier covenants that the States had entered into with Port Authority bondholders. In the past, the purchasers of Port Authority bonds were concerned about potential legislative interference with Port Authority tolls and other fees and charges as well as the potential authorization of competitive facilities.[12] In 1962 purchasers of Port Authority bonds were concerned about the Authority's initial entry with its own funds into a field which was inherently incapable of profitable operation. As in the past, the Legislatures believed that statu-

[12] One reason for bondholder concern was that Port Authority bonds are open-ended; that is, there is no dollar limit on the quantity of new obligations which the Authority may, from time to time, issue—obligations which are on a par with earlier issues of Authority bonds.

tory assurances were needed if investors were to be persuaded to buy Port Authority securities. The result was the 1962 covenant.

Appellant's allegation that the 1962 covenant is in derogation of the Port Authority's Compact duties lacks merit for yet another reason. His claim that one of the original purposes for which the Port Authority was created was to perform deficit passenger rail activities is frivolous. Thus, although the 1920 report of the New York, New Jersey Port and Harbor Development Commission, which led to the creation of the Port Authority in 1921, and the 1922 comprehensive plan setting forth the Port Authority's initial duties were primarily concerned with a railroad problem, the trial court correctly pointed out that

> "the railroad problem upon which the Commission focused was not that of passenger transit but the handling and distribution of freight and cargo into and out of the Port District, and the comprehensive plan recommended by the Commission addressed itself exclusively to the transportation and distribution, not of persons but of freight and cargo by rail, and to a lesser extent by ship and motor truck". (Gaby's Appendix, pp. 47-48)

Furthermore, the 1921 Compact and the 1922 comprehensive plan legislation did not envision that the Port Authority would engage in any deficit operations. These statutes expressly precluded the Authority from pledging the States' credit or levying taxes. What was contemplated was that the Authority would finance each of its projects by the sale of revenue bonds which would be repaid by user charges.

Indeed, each of the initial Port Authority facilities was separately financed pursuant to bi-State statutes. However, in 1931 after the Port Authority faced default on its early bridge bonds (Ja Vol. IV, p. 11) the pooling concept evolved and authorizing bi-State legislation was enacted. Ch. 5, Laws of N.J., 1931; Ch. 48, Laws of N.Y., 1931. This

1931 "pooling" legislation which allows the Authority to use surplus monies from one facility to make up the deficits of another gave to this agency, for the first time in its history, the capacity to construct projects which could not, a least initially, throw off enough revenues to pay both operating expenses and debt service.

"Pooling" is therefore the *sine qua non* for Port Authority operation of deficit facilities. Without it there would have been no PATH. Accordingly, we fail to see how appellant can argue that the 1962 covenant was a fundamental alteration of the 1921 Compact since it is the bi-State authorization to "pool" revenues and not any power under the specifically Congressionally consented-to Compact and comprehensive plan which gave the Port Authority financial power to undertake a deficit railroad operation.

As has been demonstrated, appellant's attempt to distinguish *Courtesy, supra,* on the ground that the 1962 covenant was in derogation of the Port Authority's purposes is based upon factual misconceptions as to the original purposes, duties and nature of the Port Authority.

Consequently, this Court's decision in *Courtesy, supra,* that bi-State legislation in furtherance of the Port Authority's purposes does not need additional Congressional consent is indistinguishable from the instant case and mandates the dismissal of this appeal for want of a substantial federal question.[13]

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[13] Although this brief has made it clear that Congressional consent exists for the 1962 statutory covenant, we should also point out that we do not believe that Congressional consent for this type of an agreement is even required. The leading Compact Clause case of *Virginia* v. *Tennessee,* 148 U.S. 503 (1893), noted that the Compact Clause, in the light of its historical origins and in the context of the other provisions in the Clause, has a more limited scope than the words "any agreement or compact" might suggest and formulated the following test for determining which compacts need consent:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Id.* at 519.

It is evident that the 1962 statutory covenant, by no stretch of the imagination, can be construed as infringing upon the just supremacy of the United States. See *Kheel* v. *Port Authority,* 331 F.Supp. 118 (S.D.N.Y. 1971), *aff'd on other grounds,* 457 F.2d 46 (2nd Cir.), *cert. denied,* 409 U.S. 983 (1972).

Furthermore, it is clear from the purpose of the compact clause that consent to the 1921 compact and 1922 comprehensive plan did not impose a federal mandate on the states, but rather left the states free to assign or not assign specific tasks to the Port Authority without obtaining further congressional consent. See *Rhode Island* v. *Massachusetts,* 37 U.S. (12 Pet.) 657, 725 (1838).

CONCLUSION

In view of the foregoing, it is respectfully submitted that the appeal by Mr. Gaby should be dismissed summarily for want of a substantial federal question.

Respectfully submitted,

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Proof of Service

I, JOSEPH LESSER, Assistant General Counsel for the Port Authority of New York and New Jersey, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of June 1976, I served copies of the foregoing Motion to Dismiss the Appeal of Daniel M. Gaby with Brief in Support thereof on the parties to this action, by mailing three copies thereof, in a duly addressed envelope, with first class postage prepaid, to each of the following:

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JUN 17 PAGE 1

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

APPELLANT'S REPLY TO MOTION TO DISMISS APPEAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

APPELLANT'S REPLY TO MOTION TO DISMISS APPEAL

The legislation which the State of New Jersey unanimously enacted and vigorously defended in the *Courtesy Sandwich Shop** case only 13 years ago has now become, to appellees, "absurd" (B** 21), allegedly of no value to bondholders but rather a peripheral redundancy for a "specially privileged class" (B 2)—those private investors who loaned over one billion dollars of private capital to a state agency in reliance upon the word of the state. The

* *Courtesy Sandwich Shop, Inc.* v. *The Port of New York Authority,* 12 N.Y.2d 379, *appeal dismissed,* 375 U.S. 78, *rehearing denied,* 375 U.S. 960 (1963).

** "B" refers to Appellees' Motion to Dismiss. "T" refers to the trial transcript. "Stip." refers to the stipulation.

contract with bondholders which the states determined was absolutely necessary to the assumption of the Hudson & Manhattan by the Port Authority is now, to appellees, an impediment which had a "profoundly deleterious effect" on transportation (B 4).

Appellees' motion is based primarily upon their reiteration of the trial court's conclusions of fact, which are not binding upon this Court. *E.g., Fiske* v. *Kansas,* 274 U.S. 380, 385 (1927); *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 121 (1954).

A. The trial court's findings with respect to the effect of repeal.

Two wholly distinct and independent grounds of impairment were demonstrated below, each of Constitutional proportions: (1) repeal of the Covenant cancelled a security device valuable to bondholders and (2) repeal adversely affected the secondary market for the bondholders' investments. The trial court acknowledged the first ground of impairment:

> "To the extent that the repeal of the covenant authorizes the Authority to assume greater deficits for [deficit rail mass transit] purposes, it permits a diminution of the pledged revenues and reserves and may be said to constitute an impairment of the states' contract with bondholders." (A 95) (footnote omitted)

and also the second:

> "There can be no question but that immediately following repeal and for a number of months thereafter the market price for Port Authority bonds was adversely affected. This was conclusively demonstrated by plaintiff's exhibits comparing the market price of selected Port Authority bonds, before and after repeal, with the prices of comparable bonds over the same period." (A 92)

The trial court found also that if the Covenant is to be understood in the sense that it furnished "security for the bondholders and . . . protected the diversion of the earnings of the Port Authority into deficit mass rail transit" then "the record supports plaintiff's claim that investors relied on the Covenant in purchasing Authority bonds." (A 91).

It is not, as appellees suggest, that the trial court found "no adverse effect upon bondholders" as a result of repeal. (B 5). Rather, the trial court described an *eight month* market decline as "short-term" and said in effect that bondholders should be satisfied with the various tests and other bondholder protections which preceded enactment of the 1962 Covenant and which remain in effect. These very same tests and protections were considered in 1962 to be wholly inadequate to ensure the continued acceptance of Port Authority obligations in the face of the agency's first entrance into the field of perpetual deficit rail mass transit.* Absent the Covenant, the states' power to direct the Port Authority into deficit rail mass transit was only theoretical since the necessary financing would never have been forthcoming on acceptable terms. (A 90).

Appellees say on the one hand (B 7, 21, 22) that the 1962 Covenant is superfluous for bondholder protection and on the other (B 13) that only by repeal of the Covenant can hundreds of millions of dollars of pledged revenues and reserves be diverted to rail mass transit. Then they seek

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* Appellant showed below, as a hypothetical demonstration of the inadequacy of other bondholder "protections", that the other tests would not prevent a takeover by the Port Authority of a New York City subway line. While such a takeover may be unlikely (even though Mayor Beame has proposed diverting Port Authority revenues to the subways), the Port Authority financial expert who was called at the request of the trial court testified that of all of the tests and other bondholder protections *only* the 1962 Covenant would prevent a Port Authority takeover of the Second Avenue subway line in New York City (T 546-549). Bondholders are now to be satisfied with only these other so-called protections.

to justify the diversion by reference to an alleged windfall to the agency as a result of repeal:

> "The toll increase revenues, estimated at $40 million per year, will be used to finance mass transit projects that remained dormant while the Covenant stood. See A80-84.
>
> . . .
>
> "Appellant's assertion that bondholders have lost $240 million of 'their' protection J.S. 24 fn., 18, is plainly contrary to fact. All of that money, and much more, will come from funds generated by the toll increase, not otherwise available to bondholders." (B 12-13).

The toll increases upon which Appellees rely to sustain retroactive repeal of the Covenant in 1974 were instituted almost one year *after* repeal. Rather than being a carefully formulated exercise of the police power, the announcement of the toll increases in April, 1975 prompted these reactions:

1. The Governor of New York said that he was undecided whether to approve the increases.

2. The New Jersey Assembly and New Jersey Senate unanimously passed resolutions opposing the increases and calling for a gubernatorial veto. (New Jersey State Senate Concurrent Resolution No. 3016 (April 17, 1975); New Jersey State Assembly Resolutions 3009, 3010 (April 24, 1975)).

3. The New York State Senate passed a resolution urging Governor Carey to veto the increases. (New York State Senate, Resolution No. 51 (April 15, 1975)).

4. The Governor of New Jersey said that he had not been consulted regarding the increases and then announced that he would veto the increases unless

the Port Authority immediately reinstituted a commuter discount (thus encouraging additional automobile traffic), which the agency agreed to do.

5. A member of Congress and other groups and individuals instituted a proceeding to challenge the increases as violative of the Federal Bridge Act of 1906 (34 Stat. 84).*

Appellees' repeated references to the estimated $40 million in new annual revenues from the toll increases are inexplicable in light of the fact that the Port Authority's own Annual Report** for 1975 flatly refutes any contention that the toll increases have enhanced materially the agency's net revenue or reserve position. The toll increases were instituted on May 5, 1975. At an alleged annual rate of $40 million in new net revenue approximately $26.7 million in new net revenue should have been realized by the Port Authority during 1975. While *gross* revenues increased by $48 million (versus a $37 million increase in the prior year), *total* Port Authority revenues before debt service in 1975 increased by only $14.03 million (disregarding securities value adjustments), and surplus reserves in excess of mandated bonded debt service, which might be considered the true "surplus" of the Port Authority, rose from $23,570,000 to $23,866,000, an increase of only $296,000, not the $26.7 million which supposedly was realized from the toll increases. Operating expenses alone increased by over $37 million from 1974 to 1975, more than consuming any new revenues resulting from the toll increases.

---

* This case, which if successful could result in a rollback of the toll increases, has not yet been decided. In April, 1976 the Federal Highway Administrator ordered that public hearings be held to review the toll increases.

** A public document subject to judicial notice. *E.g., Bush Terminal Co.* v. *City of New York*, 282 N.Y. 306, 316 (1940); see *United States* v. *Louisiana*, 363 U.S. 1, 12-13 (1960); *Deutch* v. *United States*, 367 U.S. 456, 470 (1961); *cf.* Fed. R. Evid. 201(b).

Appellees refer (B 8-9) to the post-trial effort by one of Appellant's experts to support and improve the market for Port Authority Bonds. As stated in an affidavit by the expert submitted to the New Jersey Supreme Court, this effort "had very limited and short-lived success because institutional investors continued to be unwilling to purchase Port Authority Consolidated Bonds given the possibility of substantial involvement of the Port Authority in deficit rail mass transit operations."

Appellees refer to the rating agency reports on the Port Authority (B 9), but the rating agencies have not yet evaluated any Port Authority bond issue for additional mass transit purposes, and Appellant showed at trial that Port Authority bonds declined in the market as compared with bonds of the same rating. (*E.g.*, T 127-10 to 128-25). Appellees say that the Port Authority rather than bondholders sought the 1962 Covenant (B 9), a statement expressly contradicted by the trial court, which found that the Covenant was enacted "so as to promote continued investor confidence in the Authority." (A 90).

B. The trial court's finding that the retroactive repeal of the 1962 Covenant was a proper exercise of the police power.

Appellees would equate happenstance with legislative history—they discuss at length (B 10-12) energy and environmental factors* as though quoting from some detailed legislative history of the retroactive repeal of the Covenant. No such history exists. In striking contrast to the enactment of the Covenant and its prospective repeal, the retroactive repeal was enacted without legislative fact-finding, without meaningful legislative debate, without

* There were much the same concerns at the time the Covenant was enacted. (Stip. 52-58).

public hearing to allow opponents or bondholders to express their position. (Stip. 348).*

There is no exercise of the police power here. The repeal of the Covenant has one purpose and one effect—it enables the states to transfer from taxpayers to a public authority the obligation to pay for an unquantified and unquantifiable additional part of the rail mass transit deficits of Metropolitan New York. The case involves money, and only money.** Anything which might be accomplished with repeal can to the same extent be accomplished without repeal if the states, or either of them, are willing to stand behind the necessary financing.

C. The federal questions are substantial.

A selective history of judicial interpretations of the contract clause (B 13-19) leads appellees to the conclusion that the states may "modify contracts where the end is legitimate and the measures taken are reasonable." (B 19). Here, of course, there is no "modification" but rather the total cancellation of the contract in question. The "municipal bond" cases cited by appellees (B 20-21) lend no support to their contention that a state may unilaterally abrogate a security device in a bond contract.

* Not one legislator from either state, nor either Governor, publicly expressed even the most casual connection between retroactive repeal of the 1962 Covenant and any energy or environmental problem.

** That the case involves only money may be illustrated by the fact that prior to repeal of the Covenant the State of New Jersey had committed itself to fund the local share of the PATH extension to Plainfield, New Jersey, then estimated at $40 million. Upon the change in administrations and subsequent retroactive repeal the state reneged on this commitment and instead said that the Port Authority should fund the local share of the extension. The concern of bondholders with a revenue agency's involvement in deficit rail mass transit may be illustrated by the fact that in only three years this local share of the PATH extension alone has risen from $40 million to $80 million to $128 million.

Of the four Massachusetts opinions cited, the two Opinions of the Justices are advisory opinions which have no binding precedential value. *City of New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard and Nantucket S.S. Authority,* 336 Mass. 651, 656, *appeal dismissed,* 358 U.S. 53 (1958). In *Opinion of the Justices,* 313 N.E.2d 882 (Mass. 1974), the court upheld a statute cancelling a property tax exemption for lessees from the Authority while saying that the tax exemption would have been enforced if it were clear that the legislature had originally intended to conclude a binding contract to that effect. In *Massachusetts Port Authority* v. *Treasurer and Receiver General,* 352 Mass. 755 (1967), the Authority was responsible only for partial payment of its predecessor's employee benefits; the impairment, if any, was plainly insubstantial. In *New Jersey Sports & Exposition Authority* v. *McCrane,* 61 N. J. 1, *appeal dismissed,* 409 U.S. 943 (1972), the only discussion of the contract clause was *dictum;* the case did not involve an impairment. Nor did *Arizona State Highway Commission* v. *Nelson,* 105 Ariz. 76 (1969). *Beaumont* v. *Faubus,* 239 Ark. 801 (1965) sustained the deposit of United States government bonds in an irrevocable trust in substitution for prior security; the bondholders' security was in fact enhanced. In *City of New Bedford, supra,* there was no threat to the security of the bonds because, unlike the Port Authority, the Commonwealth stood behind the agency and would loan it money (to be recovered by a special tax) to cover any reserve fund deficit. *Opinion of the Justices,* 334 Mass. 721 (1956) did not involve an impairment; it was strictly an advisory opinion. In *Jacksonville Port Authority* v. *State,* 161 So.2d 825 (Fla. 1964), the challenged transaction added another obligor to an issue of general obligation bonds, thus putting the bondholders in a *better* position than before. Until the present case, courts which have in fact considered impairment of covenants in municipal bond contracts have been unanimous in their condemnation of state attempts to subvert any material part of the bond contract. *E.g., First National Bank* v. *Maine Turnpike Authority,* 153 Me. 131 (1957); *Ruano* v. *Spellman,* 81 Wash. 2d 820 (1973); *see Opinion of the Justices,* 356 Mass. 775, 794-96 (1969).

Appellees say again (B 21) that bondholders are not damaged by repeal. If this is so, if material amounts of pledged revenues and reserves are not to be diverted to deficit rail mass transit, then why repeal the Covenant?

Appellees rely on a successful bond issue by the Port Authority in 1962 on the eve of the Covenant's enactment and on the agency's financing success while the Covenant was in effect* (B 23) as evidence that the Covenant was *not* relied upon! This since investors supposedly were on notice that the Covenant was cancellable at the whim of the states. To say that this is contradicted by the record is an understatement. (*E.g.,* T 93-5 to 6; T 239-4 to 240-7; T 58-16 to 18; T 275-2 to 10; T 82-4 to 15; T 84/85-22 to 86-17; T 317-20 to 318-8; Stip. 184, 255; T 398-12 to 17). Nor did the *prospective* repeal of the Covenant in 1973 (B 23-24) affect investors' reliance on it, since it was widely known that the Covenant would continue to protect all outstanding Port Authority obligations until the maturity in 2007, or the unlikely earlier retirement, of all outstanding bonds directly affected by the Covenant. This is why Appellant (T 850-13 to 853-17) and other institutional investors (T 764-21 to 765-7) continued to purchase Port Authority bonds after the prospective repeal; these *same* investors immediately ceased buying and in fact began to liquidate their holdings when retroactive repeal appeared to be possible. (T 764-15 to 765-16).

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* In any case, the sale of bonds at 3½%, or 6%, or 5½% is, in itself, meaningless absent a sophisticated analysis of the interest rates borne by contemporaneous issues of bonds of similar maturity and varying quality. For example, a sell-out at 6% is not in fact successful if comparable issues are yielding only 5%.

Appellees say:

> "[A]ppellant neglects to advise the Court of the fact that at the time of trial (February 1975) the prices for bonds of the Port Authority of New York and New Jersey and of the Massachusetts Port Authority (an agency selected for comparison by appellant) bore exactly the same relationship to each other that they did when appellant's exhibits began (July 1973) and immediately prior to the repeal of the covenant (April 1974). A92-93." (B 25).

And appellees neglect to advise the Court that (1) the rise in the market for Port Authority bonds was caused by technical market adjustments (T 182-11 to 12; T 409-7 to 411-14), and not by any reevaluation of the agency's credit; (2) the technical rise in the market did not occur with respect to the other Port Authority issues analyzed by Appellant's experts; and (3) the technical rise in the market was short-lived; Port Authority bonds soon fell to their former depressed level where, with minor variations, they have remained.

The obvious flaw in appellees' defense of repeal is that the 1962 Covenant did not for a moment restrict either state in taking direct and effective action in response to the evils now asserted to justify its unilateral cancellation. The police power defense is an illusion; the federal questions presented by this appeal are plainly substantial.

D. This Court may note probable jurisdiction and defer further consideration pending determination of the related case.

Appellees' statement that the resolution of the related case "turns entirely on the federal issues" which were "fully litigated" in this case is erroneous and inconsistent with their request (A 105), that the New Jersey court decide the issue of the validity of the New York repeal under

the New York Constitution (Article I, §§6, 7). After declining to do so, the New Jersey court based its decision solely on the contract clauses of the United States and New Jersey Constitutions and did not consider the due process validity of the repealer. (A 94 fn. 36).

Appellee's suggestion that the decision in the New Jersey case will estop Appellant from litigating the validity of the New York repealer in New York courts is frivolous. In declining to consider the entirely separate issue of the validity of the New York repealer, the New Jersey trial court said ". . . that question should be left to the New York courts for decision. . . . It may be noted that U.S. Trust has filed a declaratory judgment action in the New York Supreme Court which is presently pending." (A 105 fn. 42). Contract rights are property rights entitled to protection under the due process clause of the New York Constitution. *E.g., Tilton* v. *City of Utica,* 60 N.Y.S.2d 249, 263-65 (Sup. Ct. 1946). New York Courts are considerably more reluctant than those in New Jersey to approve state action which impinges on contract rights even where, unlike the present case, a *bona fide* emergency prompts the impairing legislation and the state has agreed to stand behind the contract right in issue. *Sgaglione* v. *Levitt,* 37 N.Y.2d 507 (1975).

CONCLUSION

This Court should reverse the judgment of the Supreme Court of New Jersey or, in the alternative, note probable jurisdiction of the appeal and, if the Court deems it appropriate, order the appeal deferred pending resolution of the related action in New York.

Respectfully submitted,

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MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

75-1687 No. [redacted]

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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June 4, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Securities Industry Association through its Public Finance Council hereby respectfully moves for leave to file the accompanying *amicus curiae* brief in the above-described action in support of the jurisdictional statement filed by appellant, United States Trust Company of New York. The consent of counsel for the appellant has been

obtained. The consent of counsel for the appellees was requested but refused.

The interest of the Public Finance Council of the Securities Industry Association in this case arises from the fact that its members will be directly and substantially affected by the ultimate outcome of this litigation, as they have been already affected by the repeal of the 1962 Covenant and by the decision rendered in this case by the Superior Court of the State of New Jersey and affirmed by the Supreme Court of the State of New Jersey.

The Securities Industry Association is a trade association representing the leading firms and organizations whose business is the raising and allocation of capital moneys. Its members constitute a broad cross-section of the securities industry—investment bankers, brokers, dealers, underwriters, bond departments of banks, among others. The Public Finance Council of the Association has a vast wealth of collective experience in, familiarity with, and expertise with respect to the securities markets for obligations of state and local governments, a unique market.

The Public Finance Council is confident that appellant will adequately present the importance to Port Authority bondholders of this Court's decision on the constitutionality of repeal of the 1962 Covenant. However, the Public Finance Council is singularly able to present facts concerning the impact of the decision on the constitutionality of the repeal on the municipal bond market generally, on the borrowing ability of state and local governments which Council members represent as investment bankers, and on the general investing public. The Council respectfully submits that the general importance of the questions presented to this Court requires that such facts be presented by the Council as *amicus curiae*.

Although appellant's jurisdictional statement was served on May 21, 1976, the Public Finance Council did not learn until June 2nd that appellees intended to file a motion to dismiss the appeal herein. The Council has been advised that appellees have agreed to serve and file their motion to dismiss the appeal on Monday, June 7th, and that appellant has agreed to serve and file its response thereto within three or four days thereafter, so that this Court may consider the matter this Term. The Public Finance Council is serving and filing the within motion and brief on Monday, June 7th. Since the accompanying brief restricts itself to describing the importance of this appeal to the persons and entities enumerated above the Council respectfully submits that appellees should be able to file their objections to the within motion, if they so desire, within three or four days so that distribution and consideration of the jurisdictional statement and motion to dismiss will not be delayed.

June 4, 1976

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1975

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF *AMICUS CURIAE*

The Securities Industry Association, through its Public Finance Council, respectfully submits this brief in support of the jurisdictional statement filed herein by appellant United States Trust Company of New York. This brief will not address itself to the legal issues considered in the jurisdictional statement, nor will it analyze the lower

court's decision. Rather, this brief will deal solely with the general importance of this case to the investing public and the members of the securities industry involved in the municipal bond market.

Interest of *Amicus Curiae*

The Securities Industry Association is a trade association representing the leading firms and organizations involved in the raising and allocation of capital moneys. The Association, through it Public Finance Council, is comprised of investment bankers, brokers, dealers, underwriters, and bond departments of banks, among others, who participate in the financing of tax-exempt obligations of states and local governments.

The decision on the constitutionality of the repeal of the 1962 covenant will have a direct and substantial impact on the general investing public and, perforce, on the securities industry generally.

Argument

The financing of tax exempt obligations includes the financing of obligations of states, cities, public authorities and other local governmental districts. In the past five years such issuers have issued from $23 billion to $29 billion of long-term debt in each year. Such financing encompasses a wide range of public purposes ranging from toll roads, bridges and airports to schools, fire engines and other essential governmental needs. The size of issues ranges from $10,000 to $1 billion. Although the market is diverse, it is based upon the reliance of prospective purchasers on the security offered by the issuers. Assurance of payment and continuation of the inviolability of the security for such payment are essential to a proper func-

tioning of the market. In turn, the continuation of an effective operation of state and local governments is dependent upon such issuers' access to capital moneys. Such access is dependent upon the continued integrity of the security and source of payment of such obligations, as well as the integrity of the pledges and contractual undertakings of the issuers made in connection with the issuance and sale of their obligations.

Over the years investment bankers and investors alike have believed that the legal strengths of state and local government financing have been properly based on (1) the rule that the statutes under which bonds are issued are an integral part of the bond contract and (2) the provision in Article I Section 10 of the Constitution of the United States that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." The repeal of the 1962 Covenant has constituted a challenge to the propriety of both of these beliefs, and thus constitutes a threat to the very foundations of municipal credit generally.

The 1962 Covenant was embodied in concurrent statutes adopted by the New Jersey and New York legislatures authorizing construction by the Port Authority of New York and New Jersey ("Port Authority") of the World Trade Center and providing for the take over of the Hudson-Manhattan Tubes, now PATH. Section 6 in each of the statutes includes the following: "The 2 States covenant and agree with each other and with the holders of any affected bonds . . ." that no pledged revenues shall be applied ". . . for any railroad purposes whatsoever other than permitted purposes. . . ." This covenant served to maintain the strong credit standing and the borrowing power of the Port Authority, by reassuring investors that assumption of PATH and its inevitable deficit did not con-

stitute a precedent for other similar perpetual deficit projects. The solemn promises included in this covenant were relied upon by underwriters and investors in the purchase and sale of $1.2 billion bonds following its enactment.

For the entire investment community this covenant epitomized the security—an inviolate contract—essential to persuade investors that the bonds to be purchased were based on sound credit standards. The continuing integrity of such covenants is essential so that state and municipal governments may market their bonds successfully. The repeal of the 1962 Covenant was destructive of investor confidence and has had a severe impact on public credit. Accordingly, the ability of states and municipal governments to finance capital projects at reasonable rates is inextricably involved in this controversy. The controversy is not limited to the Port Authority or the two states involved, but involves the entire country. Final and decisive action by the United States Supreme Court is necessary to reassure the investing public that the hundreds of billions of dollars invested in state and local obligations are indeed protected by the impairment clause of the Federal Constitution.

Conclusion

The decision rendered by the Superior Court of the State of New Jersey which was affirmed by the Supreme Court of the State of New Jersey has already had an adverse effect upon the ability of states and local governments to raise necessary capital to meet their capital requirements. For this reason it is necessary that this Court note jurisdiction in this matter for final determination of the issues raised in

the courts below, and decide the issues so that the investment community may be able to properly evaluate the enforceability of the pledges and contractual undertakings contained in obligations of state and local governments.

Respectfully submitted,

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Appellees.

On Appeal from the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO MOTION AND BRIEF OF *AMICUS CURIAE*

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Dated: June 7, 1976

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

On Appeal from the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO MOTION AND BRIEF OF *AMICUS CURIAE*

Counsel for respondents refused to consent to the filing of the brief amicus curiae and opposes the motion seeking leave to file such a brief.

Respondent respectfully objects to consideration of the amicus brief by the Court for the following reasons:

1. The motion and brief are not timely under Rule 42. Amicus briefs and motions may be filed only within a reasonable time prior to the consideration of the jurisdictional statement. This amicus brief and motion were filed on the same day as respondent's motion to dismiss the appeal. Respondent has thus been precluded from answering it fully. Inasmuch as amicus' counsel, Hawkins, Delafield and Wood, were co-counsel with Appellant's counsel below, there is no excuse for having failed to file the amicus brief contemporaneously with the jurisdictional statement.

2. Not only were counsel for the amicus counsel of record below, but the members of amicus are largely members of the plaintiff class represented by appellant.

3. The amicus brief consists primarily of sweeping factual assertions which were disproved at trial. Those assertions are the sort that should be answered in detail, a route not open to respondents because of the untimeliness of the filing. Two examples will suffice. Amicus asserts that "For the entire investment community this covenant epitomized the security. . . .' Yet appellant's chief witness testified that there is no such unified financial community. Tr. 368.

Amicus also maintains that the inviolability of bond agreements is essential to the marketing of municipal obligations everywhere. Yet the Massachusetts Supreme Court advised in 1956 that, "The features of [the bill establishing the Massachusetts Port Authority] purporting to grant exclusive privileges as long as any bonds are outstanding would be subject to revocation and amendment by succeeding Legislatures." Opinion of the Justices,

334 Mass. 721, 136 N.E. 2d 223, 232-233 (1956). Massachusetts Port Authority bonds sell without difficulty. Indeed, at trial appellant chose those bonds as a high-quality security with which to compare the bonds at issue in this case.

4. Finally, the amicus brief merely repeats appellant's central thesis—that municipal bonds enjoy especially privileged protection, denied to all other contracts, from the reasonable exercise of governmental power. That claim, rejected in the courts below and elsewhere throughout the country, presents no substantial federal question.

Respectfully submitted,

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By Special Counsel:

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Supreme Court, U. S.
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BRIEF FOR APPELLANT

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August 12, 1976

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF FOR APPELLANT

Appellant appeals from the judgment of the Supreme Court of New Jersey, entered February 25, 1976, affirming the decision of the Superior Court of New Jersey, Law Division, Bergen County, which held that the unilateral retroactive cancellation of a statutory bond covenant intended for the protection of creditors of The Port Authority of New York and New Jersey was not in violation of the Contract Clause or the Due Process Clause of the United States Constitution.

Opinions Below

The decision and opinion of the Supreme Court of New Jersey is reported at 69 N.J. 253 (1976), and is set forth in the Single Appendix at pages A132-A170. The decision and opinion of the Superior Court of New Jersey, Law Division, Bergen County, is reported at 134 N.J. Super. 124 (1975), and is set forth in the Single Appendix at pages A59-A129.

Jurisdiction

Appellant initiated this action in the Superior Court of New Jersey, Law Division, Bergen County, pursuant to N.J.R.S. §§ 2A:16-50 *et seq.*, seeking a declaration that Chapter 25 of the Laws of New Jersey of 1974 contravened the Contract and Due Process Clauses of the United States and New Jersey Constitutions. Chapter 25 retroactively repealed[1] that part of the New Jersey Legislation enacted in 1962 (N.J.R.S. § 32:1-35.55(b)) which had embodied a statutory covenant between the States of New Jersey and New York and with the holders of Consolidated Bonds of the Port Authority of New York and New Jersey. The 1962 Covenant specifically limited the involvement of the Port Authority's revenues and reserves in the area of deficit rail mass transit.

After a trial in February 1975, narrowly limited to the issues of bondholder reliance on the 1962 Covenant and the extent of the damage to the secondary bond market caused by the repeal, the trial court entered an order on May 14, 1975, dismissing Appellant's complaint and declaring that Chapter 25 was constitutionally valid. Appellant appealed

1. Due to the bi-state nature of the Port Authority, valid action by both States was necessary to repeal retroactively the 1962 Covenant. On June 15, 1974, New York passed legislation similar to Chapter 25. (Ch. 993, Laws of New York of 1974).

that decision directly to the Supreme Court of New Jersey which, on February 25, 1976, affirmed the superior court's judgment, *per curiam*. The Notice of Appeal to this Court was timely filed in the Supreme Court of New Jersey on May 14, 1976; the jurisdictional statement was filed May 21, 1976, and this Court noted probable jurisdiction on June 28, 1976.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(2), this being an appeal from a final judgment of the Supreme Court of New Jersey, the highest court of that State, holding that Chapter 25 of the Laws of New Jersey of 1974 is not repugnant to Article I, Section 10, Clause 1 of, or the Fifth and Fourteenth Amendments to, the United States Constitution.[2]

Constitutional and Statutory Provisions Involved

The Constitutional provisions which Appellant contends have been violated by the retroactive repeal of the 1962 Covenant are Article I, Section 10, Clause 1 of the United States Constitution, commonly known as the "Contract Clause", which provides in part as follows:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

and the following clauses of the Fifth and Fourteenth Amendments, respectively:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation", and
>
> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

2. In our Jurisdictional Statement we said that the Court could decide in its discretion to note probable jurisdiction and defer consideration on the merits pending final disposition of the related action in New York (JS 3-4). A similar deferral could be appropriate prior to or following oral argument depending upon the status at that time of the New York case.

This case also involves N.J.R.S. § 32:1-35.55(b), the 1962 Covenant, set forth at pages A10-A14 of the Single Appendix, and Chapter 25 of the Laws of New Jersey of 1974, which retroactively repealed the 1962 Covenant.

Questions Presented

1. Is the 1962 statutory covenant between the States and with creditors of a state agency secure against impairment by subsequent legislative action?

2. If the statutory covenant is subject to the States' police power, was repeal of the covenant an exercise of the police power?

3. If the retroactive repeal of the statutory covenant is viewed as an exercise of the police power, was such exercise consistent with the Contract Clause and the Due Process Clause of the Federal Constitution?

Statement of the Case

A. Introductory Statement.

Appellant instituted this action in three capacities: (1) as trustee for the holders of $200,000,000 of Port Authority Consolidated Bonds, (2) on its own behalf as holder of almost $100,000,000 of Port Authority Consolidated Bonds in trust and other fiduciary accounts and (3) on behalf of the holders of over $1,600,000,000 of outstanding Consolidated Bonds. The action seeks a declaratory judgment that Chapter 25 of the Laws of New Jersey of 1974, which unilaterally and retroactively cancelled a statutory covenant between the States of New York and New Jersey and with holders of Consolidated Bonds of the Port Authority, violates the United States Constitution.

B. Formation of the Port Authority.

The Port Authority was established in 1921 by a bi-state Compact as a financially independent authority to accomplish public purpose projects with funds contributed by private investors. (A531, 532, 533). The agency was created to deal with the commercial needs of the Port of New York—the handling, distribution and transportation, not of persons, but of freight and cargo by rail, ship and motor truck. (A529-536); (Ch. 130, Laws of New Jersey of 1917). Since they organized the Port Authority with only the support of a modest initial appropriation, without any taxing power, and without any power to pledge the credit of either State, the two States dedicated themselves in their Compact to the "encouragement of the investment of capital" in the Port Authority to finance those projects authorized for Port Authority development by the two States. Public financing was to be accomplished by giving the Port Authority power to mortgage its facilities and to pledge the revenues from such facilities to secure the payment of bonds issued to private investors. (A532). Over the years since its formation the Port Authority has marketed almost $4 billion of its obligations to private investors.

Consistent with the organization of the Port Authority as a freight coordinating agency, the two States in 1922 agreed upon a Comprehensive Plan which set forth the development program initially envisioned for implementation by the agency; the Plan dealt solely with the transportation of freight by carriers and was not in any way concerned with the movement of passengers by rail or otherwise in the Port District. (A533-535).

C. Port Authority Financing from 1921 through 1961.

The superior court outlined the basic financing principles which have guided the Port Authority for over fifty years:

"Under the terms of the Compact the power to levy taxes or to pledge the credit of either state was expressly withheld from the Authority. From its inception, with the exception of monies advanced as loans by the states, the Authority was required to finance its facilities solely with money borrowed from the public and to be repaid out of the revenues derived from its operations. By reason of these financial limitations two concepts initially emerged which have played an important role in the realization of the purposes for which the Authority was created: first, the specific projects undertaken by the Authority should be self-supporting, *i.e.,* the revenues of each should be sufficient to cover its operating expenses and debt service requirements; and second, *since the Authority is a public agency over which its creditors have no direct control, the bondholders should be protected by covenants with the Authority and with the states which have ultimate control over its operations.*" (A70-71) (emphasis added).[3]

Beginning in 1952, the Port Authority adopted by resolution its present method of financing with Consolidated Bonds. The purpose of the adoption of this financing structure was to use a single vehicle for the financing of any and all purposes for which the Port Authority was or might

3. The principle of binding covenants as a means of securing investor confidence led the two States to enact a number of covenants providing protection for bondholders. None of them, except for the 1962 Covenant, has been repealed, even prospectively. For example, the two States in 1925 agreed not to authorize the construction of competitive bridges within the Port District nor to limit the right of the Port Authority to levy such charges and tolls as it deemed convenient or necessary to produce revenues adequately to fund the bonds. (Ch. 27, Laws of New Jersey of 1925, §5). The two States included similar provisions in the financing legislation for subsequent Port Authority bridges. These covenants have been so scrupulously adhered to in the past that the Tappan Zee Bridge was constructed at the widest point of the Hudson in order to avoid breaching the covenants with respect to construction of competitive bridges. (A874).

be authorized to issue bonds secured by its General Reserve Fund. (A741-743). This change in the method of financing did not result in the abandonment of the self-supporting facility principle which had governed Port Authority financing over the prior 30 years.[4] As noted by the then Executive Director of the Port Authority in his testimony before New Jersey's Farley Committee in 1961, the Port Authority never abandoned its original mandate from the States to engage only in self-supporting operations:

> "[W]e have never gone into any field before where we couldn't look a bondholder in the face and say, 'We honestly believe that we can make this self-supporting and that you'll get your money back.' We have been wrong. In the case of the motor truck terminals, certainly we were wrong. And those terminals by themselves have not earned enough and without the pooling of the general reserves wouldn't be enough." (A648; Statement of Executive Director of the Port Authority before the Farley Committee, May 5, 1961).

To be sure, many of the facilities undertaken by the agency endured years of marginal operation before becoming profitable, and some continue to show modest

4. With respect to the concept of self-supporting facilities, the initial bonds issued to the public by the Port Authority were "closed-end" bonds with the revenue from each facility pledged toward the payment of the expenses of and debt service on the bonds issued to finance that particular facility. N.J.R.S. 32:1-39, 62, 86. Surplus, if any, derived from the specific facility would be deposited in a separate reserve fund available to bondholders of the series of bonds issued to finance the facility. (A819-820). In 1931 the States directed the Port Authority to pool defined revenues, in an amount equal to ten percent of outstanding Port Authority bonded indebtedness, to the extent that such revenues were available after payment of facility expenses and debt service. This General Reserve Fund, pledged to bondholders as security for their investments, did not reach its statutory limit until 1946. (Ch. 5, Laws of New Jersey of 1931).

deficits.[5] But the principle of only embarking on ventures expected eventually to be self-sustaining remained inviolate until the agency finally developed the means to involve itself financially in deficit rail mass transit.

D. Port Authority Involvement in Mass Transit.

As early as 1922, the legislatures recognized that the Port Authority was not the appropriate agency to develop a solution to the problems of railroad passenger transit. (A569). Efforts to divert the Port Authority from its port development goals were made in 1927 and were blocked by Governor Smith of New York, one of the agency's founders, on the ground that the Port Authority was never intended to become involved in rail mass transit. (A571-574). Between 1928 and 1958 countless studies were made which emphasized the crisis nature of rail mass transit. The studies unanimously described the mass transit situation as critical, sought vast amounts of capital, and predicted substantial deficits for any mass transit operation. (A80). During this period, it was recognized that the Port Authority, consistent with its mandate to operate as a self-supporting agency of the States, could not assume financial responsibility for a solution to the problem while fulfilling its direction to solve the freight distribution problems of the Port District and maintaining the credit standing it had developed in the minds of private investors.

By the late 1950's, the mass transit situation became even more critical with the petitions of railroads to abandon Hudson River ferry service and the increasingly grave conditions of the commuter railroads and subway systems. (A545, 546, 606, 619-620). The Metropolitan Rapid

5. For example, in 1973 four of the Port Authority's facilities showed operating deficits. The combined deficits of the heliports, Erie Basin and the consolidated passenger ship terminal were $1,009,000; PATH's deficit during that year was $18,171,000. (A737).

Transit Commission concluded then that "[c]apital for . . . construction [of transit systems] . . . must be raised by a public agency and bonds issued by it must have some measure of *public guarantee* to be saleable. *Revenue bonds for transit purposes have a bad reputation in the bond market because of the financial history and condition of transit systems.*" (Stip [6] 109) (emphasis added). A 1958 bill to have the Port Authority take over and financially develop, improve and operate passenger rail transit between New York and New Jersey was vigorously opposed by the Port Authority which said:

> "This opposition is based on the conclusion of the Commissioners that: (1) It is legally, financially and contractually impossible for the Port Authority to assume the railroads' increasingly heavy deficits from commuter operations or the cost of developing a new and comprehensive rail rapid transit system; and (2) The assumption of rail transit deficits by the Port Authority, the self-supporting agency of the two States, would immediately cripple and very quickly destroy the program of the two States now under way for the continued development of their essential public port and harbor facilities, airports, and interstate arterial systems." (A586).
>
> • • •
>
> "Even if it were possible to ignore the legal and financial impossibility of the Port Authority assuming responsibility for commuter rail deficits as described above, such involvement would have a disastrous effect on Port Authority credit. This statement represents not only the considered judgment of the Commissioners of the Port Authority, but it is supported by views expressed by other responsible persons in the investment and banking field, who as a practical matter, are the controlling influence upon the receptivity of bondholders to Port Authority investment. Their views are uniform that

6. "Stip" references are to the Stipulation among Counsel Dated December 20, 1974. (R-Joint Appendix vol. iv.).

> the introduction of rapid transit deficits into the Port Authority's overall financial responsibility would have the effect of seriously impairing the Port Authority's credit standing." (A589).[7]

In 1959, the two States enacted concurrent legislation providing that upon the election by either State the Port Authority would be authorized and empowered to purchase and own railroad cars for the purpose of leasing them to commuter railroads. (Ch. 25, Laws of New Jersey of 1959). Bonds issued to purchase commuter cars would be guaranteed by the State electing to avail itself of the program, as New York did under the authority of an amendment to the New York State Constitution. (Article X, Section 7). In reliance upon New York State's commitment, bondholders purchased approximately $100,000,000 of Commuter Car Bonds which resulted in the acquisition of almost 500 air-conditioned passenger cars and 8 locomotives which are presently used on the Penn Central and Long Island Railroads. (A599). Thus New York availed itself of the Port Authority's expertise while maintaining its credit standing by authorizing the issuance of a new type of financial obligation by the Port Authority.[8]

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7. In January 1959, a joint report by two New Jersey Assembly Committees concluded that the Port Authority should not be called upon to undertake extensive rail passenger transit obligations because of the difficulty in estimating the size of any deficit operation and because of the fact that the Port Authority should only become involved in self-supporting facilities. (A593-597).

8. In connection with the commuter car program, an aide to Governor Rockefeller had first proposed that the Port Authority directly undertake financing responsibility for the purchase of commuter cars. This proposal was termed "ridiculous" by the Commissioner of Transportation and the Governor of New Jersey. (A322-323). It was seen as such a threat to the Port Authority's credit that the agency itself felt constrained to bring the proposal to the attention of its investment bankers, most of whom immediately condemned the program as destructive of the Port Authority's credit. (A299-301). Met with this reaction by the Governor of New Jersey, New Jersey's Transportation Commissioner, the Port Authority and its investment bankers, the aide to Governor Rockefeller then developed the guaranty program described above. New Jersey has not chosen to take advantage of this program.

In the early 1960's, it was proposed that, for the first time in its history, the Port Authority be directed to assume financial responsibility for a facility expected to require enormous capital expenditures and to sustain perpetual operating deficits. This was the Hudson & Manhattan Railroad, a privately owned interstate electric commuter railroad system then linking Manhattan, Newark and Hoboken. The takeover of the Hudson & Manhattan by the Port Authority was proposed at a time when the four commuter railroads operating in Northern New Jersey were sustaining total passenger operating deficits of almost $60,000,000 annually, the New York commuter railroads operating deficits of between $10,000,000 and $15,000,000 annually, and the New York City transit system operating deficits of $20,000,000 annually, exclusive of debt service charges of $87,000,000.

Of the several commuter rail systems serving the Port District, the financial prospects of the Hudson & Manhattan were by far the worst. It had been in reorganization for many years, and in 1959 the bankruptcy court approved a plan which left the railroad with enough cash to continue operations for only two years, with no funds for capital expenditures. *In re Hudson & Manhattan R.R.*, 174 F.Supp. 148 (S.D.N.Y. 1959), *aff'd sub nom., Spitzer* v. *Stichman*, 278 F.2d 402 (2d Cir. 1960).

In 1960, a special New Jersey Senate Committee under the chairmanship of Senator Farley was created to conduct a full investigation of the Port Authority to determine if

the agency was fulfilling its statutory obligations. (A605).[9] Testimony before the Farley Committee by both State and Port Authority officials was unanimous and unequivocal that it would have been impossible for the Port Authority to take over the H & M without contractual assurances adequate to protect the Port Authority's credit standing, since the necessary financing would never have been forthcoming from private investors. (A633).[10]

The Farley Committee report concluded that the solution to the problem of bondholder concern over the unlimited involvement of the Port Authority in deficit rail mass transit was "limiting by a *constitutionally-protected* statutory covenant with Port Authority bondholders the extent to which the Port Authority revenues and reserves pledged to such bondholders [could] in the future be applied to

9. During the pendency of the Farley Committee hearings, New York passed legislation directing a Port Authority takeover of the H & M without contractual assurances for the protection of bondholders. (A654). The mere enactment of this legislation, which was not concurred in by New Jersey, prompted Appellant, then the largest holder of Port Authority Bonds, to suspend all further investments in Consolidated Bonds because of the prospect that the Port Authority might be directed to undertake deficit rail mass transit obligations without limitation. (See Deposition of J. Sinclair Armstrong, Esq., at E346-E347).

10. Bondholders' fears were well founded. The four commuter railroads in New Jersey have passed through bankruptcy proceedings. The New York City Transit Authority, which operates the New York City Subway System, for its fiscal year ending June 30, 1973, had an operating deficit of approximately $175 million.

During the calendar year 1973, the Metropolitan Transportation Authority incurred total operating deficits on its commuter railroads of approximately $104 million. Adding the 1973 operating deficits of MTA's commuter railroads to those incurred by its subway system for the fiscal year ending June 30, 1973, produced a total operating deficit of $279 million. (A734).

Deficits estimated to have been incurred in 1975 by the Metropolitan Transit Authority were $450 million. In September, 1974, Mayor Beame of New York City proposed that Port Authority funds be used to help reduce such deficits. (A732, 860).

the deficits of possible future Port Authority passenger railroad facilities beyond the original Hudson & Manhattan Railroad System." (A656) (emphasis added). The superior court expressly found that "the Legislature of 1962 concluded it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority." (A109).

E. The 1962 Covenant.

On the basis of the Farley Committee's recommendation, the Legislature of New Jersey unanimously adopted the 1962 Covenant, which provides in part:

> "The two states covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, . . . neither the states nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth."

Governor Rockefeller, in his message approving the New York legislation embodying the Covenant, said:

> "To preserve the Port Authority's credit strength the bill includes a covenant by the two states that additional deficit financing of future railroad projects will only be undertaken within the financial limits set forth in their covenant." NEW YORK STATE LEGISLATIVE ANNUAL 324 (1962).

The States took care in the formulation of the Covenant to provide for not only the acquisition and operation of

the H & M, which the Covenant does not limit, but also to permit additional Port Authority involvement in the carriage of persons and property by rail. Thus the Covenant by its terms permits Port Authority construction of rail facilities on its bridges; it permits Port Authority involvement in freight rail facilities; it permits any mass transit involvement of the agency of which bondholders approve; it permits the agency to undertake passenger rail mass transit operations which, by federal or state financial assistance or otherwise, together with user charges, can be made self-supporting within the meaning of the Covenant. The Covenant by its terms anticipated additional Port Authority involvement in deficit rail mass transit as the agency's financial position strengthened since the Covenant's limitation is not an absolute prohibition but rather a percentage linked to and intended to expand with the Port Authority's General Reserve Fund. The Covenant's formula has no room in it today only because PATH's deficits have vastly exceeded the 1962 estimates. If the Port Authority had been permitted by the States to raise PATH fares to competitive levels there would be more than enough room within the Covenant today for the Port Authority to finance the additional rail mass transit operations which the States now wish the agency to undertake. Furthermore, no one disputes that anything which the States wish to accomplish through repeal of the Covenant can to the same extent be accomplished within the Covenant if either of the States are willing, through direct subsidies, guarantees or otherwise, to stand behind the necessary financing.[11]

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11. As Judge Tyler said in *Kheel* v. *Port of New York Authority*, 331 F.Supp. 118 (S.D.N.Y. 1971), *aff'd on other grounds*, 457 F.2d 46 (2d Cir.), *cert. denied*, 409 U.S. 983 (1972):

> "[T]he transit amendment's constraint upon non-self-supporting rail facilities does not even temporarily preclude the state legislatures from dealing with mass transit problems by other means, e.g. by enactment of subsidy programs. In these circumstances the constitutional infringement claimed is illusory." *Id.* at 122.

In 1962 and 1963, when the value of the Covenant was fresh in the minds of the legislators, the two States joined in a vigorous defense of the legislation embodying the Covenant which finally resulted in a decision on the merits by this Court that the constitutional attacks on the validity of such legislation did not present any substantial federal question. *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority*, 12 N.Y.2d 379, *appeal dismissed*, 375 U.S. 78, *rehearing denied*, 375 U.S. 960 (1963); *see Kheel* v. *Port of New York Authority, supra.*

F. Assumption and Operation of the Hudson & Manhattan Railroad.

The 1962 Covenant was effective. On September 1, 1962, the Port Authority assumed the ownership and operating responsibilities of the H & M through a wholly-owned subsidiary, the Port Authority Trans-Hudson Corporation ("PATH"), obtaining the funds necessary for the acquisition and modernization of the railroad by the successful sale of bonds to private investors. When the bonds were issued to finance the acquisition, the Commissioners of the Port Authority were able to certify, as required by resolutions authorizing each series of Port Authority Consolidated Bonds, that the acquisition and operation of the H & M would not materially impair the sound credit standing of the Port Authority, the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments to bondholders. This certification was made possible only by the enactment of the 1962 Covenant which set statutory limits on future Port Authority involvement in rail mass transit and because PATH deficits were expected to level off at $6,575,000 during the years 1969-1991. (A677). PATH losses did not level off as expected by the Port Authority, the States and the bondholders. (A681-682). Instead, PATH's present annual losses are almost five times the anticipated amount and are all borne by the Port Authority. (A681). A principal factor contributing

to these increasing deficits has been the refusal of the Governors of New Jersey and New York to allow PATH to increase its fares to competitive levels.[12] The total cumulative operating deficit of PATH for a little over 11 years of operation amounted to over $125 million. (A683).

Governors Cahill and Rockefeller, in April 1970, jointly sought increased Port Authority participation in mass transit. The governors of the two States reached an agreement in November, 1972 providing for a PATH extension to Plainfield, New Jersey via Newark Airport,[13] direct rail service for Erie-Lackawanna riders into Penn Station, New York and direct rail service from Kennedy Airport to Manhattan. The plan anticipated a Port Authority investment of between $250-300 million out of a total projected

12. Because of the significant losses incurred by the PATH system due to increased operating costs, the Commissioners, in June 1973, voted unanimously to increase the PATH fare from 30 to 50 cents. (A685-686). Such a fare increase would have been the first one permitted to PATH in 12 years. Although neither governor exercised his veto over the proposed fare increase, Governor Rockefeller, in September 1973, in return for political support for a 1973 New York transportation bond issue, announced that the fare increase should be limited to five cents. (A685). At a meeting of Commissioners some five days after the Rockefeller announcement, all five New York Commissioners reversed themselves and unanimously voted to limit the increase to five cents. Since the New Jersey Commissioners were not, at that time, subject to the same pressures exerted upon the New York Commissioners, they voted unanimously against limiting the fare increase to five cents. In 1974, however, at the ICC hearing on a proposed 20 cent increase, Commissioner Sagner, an appointee of newly elected Governor Byrne, announced his and Governor Byrne's opposition to the increase. The Commissioners promptly voted to rescind the PATH fare increase request. While the PATH fare has remained at 30 cents for almost 16 years, an equivalent ride between Newark and Manhattan on the federally subsidized AMTRAC today is $1.00 and the present Conrail fare is $1.00.

13. A 1970 program contemplating a PATH extension to Cranford, New Jersey was amended to extend the line to Plainfield, thus eliminating competition by the Central Railroad of New Jersey and bringing the project within the terms of the 1962 Covenant. (A703, 708).

cost of $650 million. It was also proposed to eliminate the 1962 Covenant with respect to the bonds issued after the enactment of that legislation. (A706).[14]

The governors' 1972 program was enacted into law, and the legislation embodying the 1962 Covenant was amended effective May 10, 1973 by the States of New Jersey and New York (Ch. 208, Laws of New Jersey of 1972; Ch. 318, Laws of New York of 1973; Ch. 1003, Laws of New York of 1972), repealing the 1962 Covenant *only* with respect to bonds issued after the date of the legislation, in effect reaffirming the Covenant with respect to outstanding bonds.[15]

In October 1974, federal consideration of the PATH application was deferred because the State of New Jersey expressed interest in acquiring the Jersey Central Rail-

14. In December 1972, the New Jersey Senate held an information session to consider the governors' proposals. At that session, Port Authority officials stated that the Lackawanna program could be accomplished *within the terms of the 1962 Covenant* by means of a $100 million federal grant and the issuance of $50 million of Port Authority bonds. The debt service on these bonds would be financed by collecting a through charge from Lackawanna riders equal to the PATH fare existing at the time the plan was implemented. (A705). The PATH extension to Plainfield via Newark Airport was also deemed "doable" in 1972 on a self-supporting basis and thus *within the 1962 Covenant* due to an anticipated $150 million in federal grants, $50 million in Port Authority bonds, and a $40 million advance from the State of New Jersey, which would be repaid by the Port Authority from the project's net operating revenues. On August 10, 1973, the Governor of New Jersey committed the State to advance this $40 million for New Jersey's share of the capital cost of the PATH Extension Project. (A708-712).

15. The introductory statement appended to the New Jersey bill provided:

> "The bill is also designed to preclude the application of the 1962 covenant to holders of bonds newly issued after the effective date of this act, *while maintaining in status quo the rights of the holders of the bonds issued after March 27, 1962* (the effective date of the 1962 covenant legislation) *but prior to the effective date of this act.*" (A707) (emphasis added).

road as an alternative to the PATH extension. (A716). A Port Authority-New Jersey Department of Transportation task force was set up to consider all potential alternatives. It was then announced that the State of New Jersey had determined that the PATH extension to Plainfield was preferred over an acquisition by the Port Authority of the Central Railroad of New Jersey. The State also announced, however, that it had unilaterally elected to renege on its commitment to provide any part of the local share of the PATH extension financing through an advance to the Port Authority to be repaid from operating revenues of the PATH extension. The State took the position that its commitment (A709-712) was not a commitment at all. It also said that the Port Authority should provide these funds, presently estimated to require diversion of Port Authority revenues and reserves of $128.4 million. Finally, the State said that this would not be the last call on the Port Authority's revenues and reserves for deficit rail mass transit operations.

G. The Use of the Covenant and Its Effectiveness in Maintaining Investor Confidence in the Port Authority.

As noted above, the Farley Committee undertook in 1960 an extensive investigation of the Port Authority and its financial structure and concluded that a constitutionally protected statutory covenant was the only way in which the need to take over the bankrupt H & M could be harmonized with the financial community's concern over the Port Authority's future credit standing.

The then Executive Director of the Port Authority said:

> "Obviously, unless such a covenant could be established no Port Authority bonds could be sold either

> for the acquisition of the Hudson & Manhattan properties or for any other Port Authority purpose." (A85).

The then New Jersey Commissioner of Transportation, stated:

> "And it seems impossible, from all of my direct—and not through any other channels—direct contacts, to observe that money could be loaned for even the acquisition of the H&M in the event there was not some assurance that this just wasn't one bite of the cherry and that further transportation business was all to be pulled together. I think it's simply a question of whether the investor says yes or no, and at the present time my observation is the investor says no unless he has that limitation." (A86).

The Port Authority's Vice Chairman, testifying on behalf of all the Commissioners, explained why they thought that the Covenant was absolutely necessary in order to induce investors to purchase Port Authority bonds after the acquisition of the H&M:

> "We can only submit to you the unanimous view of the Commissioners of the Port Authority that there is no possibility whatsoever of borrowing the money at all without a statutory assurance to investors that any future Port Authority responsibilities in the field of commuter rail transport over and above the present and existing interstate Hudson and Manhattan railroad system will not involve a pledge of the Port Authority's General Reserve Fund.
>
> "I say to you as a New Jersey Commissioner, and with all the sincerity that I can command, that there is nothing arbitrary or doctrinaire about this conclusion. It simply represents the Port Authority's credit. My business is investment financing and I say to you gentlemen that I could not sell a single

> Port Authority bond without such an assurance. If my responsibility were on the other side of the table, I would not buy a Port Authority bond that did not contain such an assurance." (A87).

Following the enactment of the 1962 Covenant and prior to its retroactive repeal, the Port Authority issued and sold to the public $1,260,000,000 principal amount of Consolidated Bonds. In connection with these financings, the Port Authority repeatedly emphasized the importance of the Covenant's protection for bondholders to induce potential investors to purchase Consolidated Bonds. The Covenant, described to the investment community as a legally enforceable contract (A861), was discussed in detail in every Official Statement distributed in connection with the sale of Consolidated Bonds after its enactment and was discussed at information sessions held to acquaint the investment community with the protections of the Covenant and the other aspects of proposed Consolidated Bond issues. (A176-177, 179, 183-184, 683, 745-749, 861-864). Annual reports of the Port Authority after 1962 also often referred to the Covenant and its protection for Port Authority bondholders. The Covenant was discussed extensively in municipal credit reports published by Standard & Poor's, Moody's and other analysts. (A176, 177).

Purchasers of Port Authority bonds since 1962 relied in substantial part on the Covenant in making their purchases. The uncontradicted testimony of the expert witnesses established that fact beyond doubt. Each of the witnesses was an acknowledged leader in his area of the municipal bond business: John F. Thompson, investment banking and investment advisor; Lester Murphy and Austin Fitzgerald, bond dealers; and Gordon Fowler, institutional investors. Thus, Appellant supplied testimony from each of the four major areas of the municipal

bond business. There was no contradictory testimony from the State.

The trial court acknowledged that "the record supports the plaintiff's claim that investors relied on the Covenant in purchasing Authority bonds." (A110). The court concluded, however:

> "But while reliance existed, the covenant cannot be said to have been the 'primary consideration' for the purchases having been made; for no witness testified that purchases would *not* have been made without the covenant, but only that they would not have purchased or recommended the purchase of the bonds 'at the price which they were then offered.'" (A110).

Even if the trial court's characterization of the witnesses' testimony were accurate, which it was not, the distinction it attempted to draw is meaningless. To say that some persons might have been willing to purchase Port Authority bonds without the Covenant at a much higher interest rate, or a much lower price, does not affect the conclusion that the actual purchasers of the bonds made their investment decisions in reliance on the Covenant. How could the court draw a meaningful distinction between not buying Port Authority bonds at all and not buying them at the price at which they were offered? If, for example, an investor purchased a Port Authority bond at 80 but would only have paid 70 in the absence of the Covenant (see A1105), can it truly be said that the existence of the Covenant was not a "substantial inducement" or "primary consideration" for the purchase? To say that bondholders would not have purchased the bonds on the proffered terms absent the Covenant is to say that bondholders would not have purchased the bonds at all absent the Covenant, since investors were not offered a bond at one interest rate with the Covenant's protection and another bond at a much higher inter-

est rate without it. They were offered a package, and the witnesses below testified that neither they nor their customers were interested in the package without the Covenant.

The price which an investor is willing to pay for a municipal bond is of the greatest significance, since it is the single most demonstrative evidence of the value which investors place on a given security. The trial court recognized this fact earlier in its opinion when it said:

> "the interest rate fixed when the bonds are initially marketed, as well as the price of the bonds in the secondary market, will normally reflect the investor's evaluation of the underlying security of his investment. . . ." (A108).

Moreover, as stated above, the superior court's characterization of the witnesses' testimony is not accurate. For example, Gordon Fowler's testimony as to whether he would have purchased Port Authority bonds without the Covenant was as follows:

> "Q. In your purchases between 1968 [and] 1973 [in] the secondary market, were you aware of the existence of the 1962 covenant? A. Yes, I was.
>
> "Q. Did the existence of the covenant affect your decisions to purchase those bonds? A. I relied on it at the time I purchased the bonds, yes." (A1104-1105).
>
> • • •
>
> "Q. With respect to all the purchases you described [approximately $9½ million of Port Authority bonds], would you have purchased any of those bonds without the protection of the covenant? A. I can't say for certain we would not have purchased them, but if we had, it would have been at a much lower price for the given coupons." (A1105).

In addition, John F. Thompson testified that the Covenant "was an important and significant part" of what he presumed he was buying for his clients, and that he would not have recommended purchase of Port Authority bonds if he had known the Covenant would later be repealed:

> "Q. Now, specifically, Mr. Thompson, do you know whether the 1962 covenant was looked to in the purchase of Port Authority bonds since 1962? A. Oh, yes, very definitely." (A872).
>
> • • •
>
> "Q. Would you explain its relative importance since 1962 in the minds of purchasers of bonds? A. Its importance in the minds of purchasers of the bonds has been that it prevented the Port Authority from getting into a massive project producing deficits in the mass transit field or several such projects.
>
> "Q. And did you personally look to the covenant and depend on it? A. Oh, certainly. *That was—that certainly was an important and significant part of what I presumed we were buying for our clients when we purchased those bonds that I speak of.*
>
> "Q. Which were those, just to make sure it's clarified? A. This is when I was at [Scudder, Stevens & Clark] and there were at least two instances where we purchased Port Authority bonds for several clients. In each instance, the total amount was at least a million dollars of bonds." (A872-873).
>
> "Q. Assuming everything else to be equal, but if the covenant had not been enacted would those purchases have been made?
>
> • • •
>
> "The Court: Well, would you have recommended, then, the purchase of the bonds?
> "The Witness: I would not have recommended them at the price which they were then offered." (A873).
>
> • • •
>
> "Q. *If you knew that the covenant would later be repealed would you have recommended the Port*

Authority bonds during the '60s? A. *No.*" (A874) (emphasis added).

The superior court noted in two places that millions of dollars of Consolidated Bonds were purchased prior to 1962 (A108, 127), suggesting that this fact demonstrates that the 1962 Covenant was not necessary to market Consolidated Bonds *after* 1962. The court was wrong. The 1962 Covenant was not necessary prior to 1962 because, until that time, the Port Authority had never undertaken a project which, from its outset, was expected, indeed intended, to generate perpetual deficits, and never to achieve self-supporting status. Prospective purchasers had no reason to expect that the Port Authority would become involved in the morass of deficit rail operations—in fact the history and structure of the Port Authority, the Commuter Car program and the statements made in the Port Authority's Official Statements all supported the opposite conclusion.

In a similar vein the superior court suggested that the absence of "direct" Covenant protection for the Fortieth and Forty-First Series shows that the Covenant was not material to bondholders. As Appellant said in its complaint, however, the Covenant provided protection for holders of those two Series since the protection afforded by the 1962 Covenant continued as a practical matter until the year 2007. This was so stated in the Official Statement of the Port Authority used in connection with each of the two Series:

> "The statutory covenant against dilution of pledged revenues and reserves by additional passenger railroad facilities, which is discussed in the paragraph quoted above, *remains in effect with respect to affected bonds, and remains binding on*

> *the Authority although it does not apply to the bonds of the present offering.* The legislation which authorized the Port Authority to assume responsibility for the Hudson Tubes system was amended, effective May 10, 1973, by the States of New York and New Jersey (Ch. 1003, Laws of New York 1972, Ch. 318, Laws of New York 1973; Ch. 208, Laws of New Jersey 1972). The New Jersey amendment, when introduced in the New Jersey Assembly, was accompanied by a statement that the bill was intended to preclude the application of the covenant to holders of bonds newly issued after its effective date, while maintaining in status quo the rights of the holders of the bonds issued after May 27, 1962 (the effective date of the covenant legislation) but prior to the effective date of the amendment." (A19-20) (emphasis added).

It was legally impossible for this protection to be removed through the early redemption of all outstanding bonds, prior to 1982. It was economically impossible, in fact, for this protection to be removed in the foreseeable future. (A1105).

The importance of the existence of the 1962 Covenant for purchasers of the last two Series was testified to by Gordon Fowler, Secretary of Connecticut General Life Insurance Company, who has responsibility in his Company for public debt investments. Mr. Fowler stated that Connecticut General purchased $3,000,000 of the Fortieth Series in reliance on the 1962 Covenant even though it had been prospectively repealed:

> "Q. Now, with respect to the 1973 purchase of bonds, did you purchase those bonds with the knowledge of the 1973 prospective repeal of the 1962 covenant? A. Yes, I did.

"Q. Would you explain that decision? A. Well, the 40th series bonds which we purchased were not covered by the covenant. However, approximately a billion seven, thereabouts, of outstanding Port Authority bonds, were protected by the covenant and it to me was unreasonable to expect that these bonds would be fully retired in the immediate future or even the foreseeable future and therefore the 40th series bonds were indirectly protected by the covenant." (A1105).

H. The 1974 Retroactive Repeal.

On February 15, 1974, a bill was introduced in the New Jersey Legislature to repeal retroactively the 1962 Covenant. In contrast to the extensive hearings, reports and findings surrounding the passage of the 1962 Covenant and its prospective repeal in 1973, the repealer in New Jersey was enacted without legislative fact finding, without extensive contemporaneous legislative debate, without public hearings to allow opponents or bondholders to express their positions,[16] without committee reports, and without amendments to the original bill. (A763). Some legislative colloquy did take place in New York State, when Mr. Farrell, the sponsor of this repealer legislation, gave the following clearly erroneous response to a question raised by one legislator as to the wisdom of the repealer:

"Mr. Strelzin: Mr. Farrell, I am under the impression that the New York Port Authority Charter provided that if there was a shortage of funds to make necessary payments to bond holders that money would be supplied by the State of New York on application to the governmental Comptroller. Am I right, sir?

"Mr. Farrell: Both states." (A772).

16. The superior court included a lengthy discussion (A98-107) of the events preceding the 1974 repealer under the heading "Legislative History of the Repeal of the 1962 Covenant." This label is misleading because there is, in fact, no legislative history attendant upon the repeal of the 1962 Covenant. As noted, no hearings were held or other opportunity for deliberation or comment afforded in either State with respect to the proposed retroactive repeal legislation. Nor were bondholders notified of the proposed repeal, notwithstanding the fact that the bonds set forth mechanics for giving notice to bondholders.

The court below, in attempting to construct a legislative justification for the repeal, looked to the background of the *1973* legislation and to the energy crisis. Such references, however, lend no support to the notion that the Legislature acted in a deliberate fashion for purposes of protecting the welfare of the citizenry. First, the 1973 prospective repeal was a reaffirmation of the inviolability of the Covenant with respect to outstanding bonds; the States' solemn pledge was honored there. Second, it must be recalled that Governor Byrne proposed the retroactive repeal in June, 1973, well before the energy crisis.

Governor Byrne did not say one word with respect to any of the alleged justifications for the legislation upon his signing the repeal legislation on April 30, 1974. (A776-777). And Governor Wilson of New York said that the only reason for his signing the repeal legislation was to settle the controversy regarding the validity of the Covenant, not to respond to any energy, environmental or health crisis:

"It is with great reluctance that I approve a bill that overturns a solemn pledge of the State. I take this extraordinary step only because it will lead to an end of the existing controversy over the validity of the statutory covenant, a controversy that can only have an adverse effect upon the administration and financing of the Port Authority, and because it will lead to a speedy resolution by the courts of questions and issues concerning the validity of the statutory covenant." (A774).

Thus, it was with a sense of political expediency, rather than with a sense of extreme public emergency, that the Legislature passed the bill which deprived the bondholders

of the protection for which they had bargained and to which they were entitled.

SUMMARY OF ARGUMENT

The 1962 Covenant constitutes a contract as that term is used in the Federal Constitution. The States' unilateral retroactive cancellation of their pledge impaired the contract in two separate and distinct ways. First, retroactive repeal of the Covenant cancelled a security provision valuable to bondholders for which they had bargained. Second, repeal of the Covenant adversely affected the secondary market for outstanding Port Authority Consolidated Bonds.

The repeal cannot be justified as an exercise of the police power. Its enactment was not dictated by need but by a desire to alter the Port Authority's functions without assuming responsibility for the costs.

Even if the repeal were viewed as an exercise of the police power, it must be held void under the Contract and Due Process Clauses.

ARGUMENT

I.

Chapter 25 of the Laws of New Jersey of 1974 Impairs the Obligation of the Contract Between the States and with the Port Authority's Bondholders.

Two independent grounds of impairment were demonstrated below, each of constitutional proportions: (1) repeal of the covenant cancelled a security device valuable to bondholders and (2) repeal adversely affected the secondary market for the bondholders' investments. The

superior court acknowledged both grounds of impairment,[17] finding as to the first:

> "To the extent that the repeal of the Covenant authorizes the Authority to assume greater deficits for [rail mass transit] purposes, it permits a diminution of the pledged revenues and reserves and may be said to constitute an impairment of the States' contract with bondholders." (A114) (footnote omitted).

and as to the second:

> "There can be no question but that immediately following repeal and for a number of months thereafter the market price for Port Authority bonds was adversely affected. This was conclusively demonstrated by plaintiff's exhibits comparing the market price of selected Port Authority bonds, before and after repeal, with the prices of comparable bonds over the same period." (A111).

1. *Retroactive repeal of the 1962 statutory Covenant cancelled a security provision valuable to bondholders.* In concluding that the retroactive repeal of the Covenant was a proper exercise of the police power of the State, the superior court said in effect that bondholders were not injured and should be satisfied with the various tests and protections which were in effect prior to the enactment of the 1962 Covenant and which remain in effect subsequent to its

17. This Court is not bound by the superior court's findings of fact since in this case a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass on the Federal question, to analyze the facts. *Time, Inc.* v. *Pape*, 401 U.S. 279, 284 (1971); *Napue* v. *Illinois*, 360 U.S. 264, 272 (1959); *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954); *Niemotko* v. *Maryland* 340 U.S. 268, 271 (1951); *Fiske* v. *Kansas*, 274 U.S. 380, 385-386 (1927); *see also* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 142-144 (4th ed. 1969).

repeal. These are the very same tests and protections carefully considered in 1962 in the face of the agency's first entrance into the field of perpetual deficit rail mass transit; they were found to be inadequate to insure the continued acceptance of Port Authority obligations. Absent the Covenant, the States' power to direct the Port Authority into deficit rail mass transit was illusory since the necessary financing would not have been forthcoming on acceptable terms.

The superior court viewed as one of the "principal protections" for bondholders the so-called "1.3 test" contained in Section 3, Condition 3 of the Consolidated Bond Resolution. (A75). The 1.3 test, which applies *only* when a series of Consolidated Bonds[18] is issued by the Port Authority, prohibits such issuance unless the net revenues of all of the Port Authority's facilities in the best twelve of the preceding thirty-six months equal or are greater than 1.3 times the prospective debt service for the calendar year in the future in which the debt service of all outstanding and proposed new bonds secured by the General Reserve Fund would be at a maximum.

The superior court reached its conclusion that the 1.3 test provides "a principal protection" for bondholders despite the uncontradicted testimony of the Port Authority financial expert, who testified at the request of the court, to the effect that considering *only* the 1.3 test it would be possible for the Port Authority to issue bonds to finance a takeover or operation of a new facility which was certain to suffer massive operating deficits, because the expected deficits of the facility would *not* be included in the 1.3 calculation. Mr. Zarin said:

18. While the Port Authority has stated its intention to issue only Consolidated Bonds, it is possible for the agency to issue another type of obligation to which the 1.3 test would have no application.

> "Q. Mr. Zarin, does the 1.3 test really protect against deficit railroad financing by the Port Authority? The Witness: Your Honor, the 1.3 test may be protective in certain very limited cases, but as I have examined it, I do not believe that it is protective against operating deficits. It is not protective in the situation . . . outlined initially, namely the assumption of operation of a new facility and if I take protection to mean . . . protection of the security [of] bondholders, therefore it would not be protective in that situation and it would not be protective in my judgment in the event of the takeover [of] an existing facility, if one were to approach that facility with the objective of bringing that facility within what we would call the general reserve fund family." (A 1028-1029).

The superior court also relied heavily on Section 7 of the resolutions authorizing each series of Consolidated Bonds as constituting protection which bondholders should view as an adequate alternative to the 1962 Covenant. The first part of Section 7 of the series resolutions (since the 12th series) prohibits the use of any Consolidated Bond Reserve funds to pay the operating deficits of a facility acquired by the Port Authority unless such facility is acquired or constructed through the issuance of an obligation secured by the General Reserve Fund and the proceeds are used for that additional facility.

The second part of Section 7 contains the so-called "Section 7 Certification," which must be made by the Commissioners of the Port Authority at or prior to the time of the issuance of Consolidated Bonds for that facility. It provides:

> "Consolidated Bonds proposed to be issued for purposes in connection with an additional facility or a group of additional facilities in connection with which the Authority has not theretofore issued bonds which have been secured by a pledge of the General

Reserve Fund in whole or in part, may be issued, and bonds other than Consolidated Bonds proposed to be issued for purposes in connection with such an additional facility or group of additional facilities may be secured by a pledge of the General Reserve Fund in whole or in part, in each case if and only if the Authority shall certify at the time of issuance (as defined in Section 3 of the Consolidated Bond Resolution) its opinion that the issuance of such Consolidated Bonds or that such pledge of the General Reserve Fund as security for such bonds other than Consolidated Bonds will not, during the ensuing ten years or during the longest term of any of such bonds proposed to be issued (whether or not Consolidated Bonds), whichever shall be longer, in the light of its estimated expenditures in connection with such additional facility or group of additional facilities, materially impair the sound credit standing of the Authority or the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds; and the Authority may apply monies in the General Reserve Fund for purposes in connection with those of its bonds and only those of its bonds which it has theretofore secured by a pledge of the General Reserve Fund in whole or in part."

The superior court correctly recognized that the Section 7 certification need only be made in connection with an issuance of bonds to finance a *new facility*, thus affording no protection to bondholders against expenditures in connection with deficit mass transit projects which do not involve new or additional facilities. As an example of the magnitude of these expenditures, the recent Newark Airport improvements, requiring the Port Authority to spend over $400,000,000, did not require a Section 7 Certification, since no additional or new facility was involved. Although these

particular improvements were not directly connected with mass transit, the method of avoiding the Section 7 certification was apparent. The legislatures of the two States proceeded to amend the definition of "air terminals" to include rail mass transit connections between Port Authority airports and New York City. (A692). The Port Authority, however, received legal opinions to the effect that, in spite of the change of definition, expenditures on the rail links would violate the Covenant. With the Covenant out of the way, a Section 7 certification would be unnecessary. It was the Covenant, therefore, which protected the bondholders, not Section 7.[20]

The Section 7 certification requires only a certification of the *opinion* of the commissioners. This *opinion* must only say that there will be no *material* impairment of the Port Authority's credit standing, or the investment status of its bonds, or its ability to fulfill its commitments to bondholders. It does not block *any* impairment; it blocks only an impairment which is material in the opinion of the Port Authority's commissioners. The 1962 Covenant does not contain the words "opinion" or "material". The superior court, which quoted extensively from a speech in 1961 by Daniel B. Goldberg, the General Solicitor of the Port Authority, ignored an important statement by Mr. Goldberg in that speech, which recognized that the Section 7 certification is nothing more than a prudent man rule:

> "To us, this [the Section 7 certification] was merely a contractual codification of an agreement and obligation which we had anyhow. . . ." (A840).

20. If, on the other hand, the rail links are held to be a new facility, it can be argued that the bondholders will not be protected by the 1.3 test, since the anticipated mass transit deficits from the new facilities would not have to be considered in the 1.3 calculation. As a result, a Section 7 certification could be made, the 1.3 test would not be effective and only the Covenant could prevent the diversion of unlimited funds.

Unlike the Section 7 certification, the 1962 Covenant requires certification of an ascertainable amount and not merely an opinion of the Commissioners of the Port Authority. This is true because at present authorization in compliance with the Covenant is limited to only "self-supporting" rail mass transit facilities in view of the existing level of PATH deficits. (A94 n. 26). "Self-supporting" is defined by the statute to mean that revenues shall at least be equal to operating and maintenance expenses and debt service. (A93).

An important and basic distinction between a Section 7 certification and a Covenant certification, which was given little weight by the superior court, is the greater precision required by the latter. The Section 7 certification permits a general certification as to whether the Port Authority can support a proposed facility by considering the projected net revenues from its whole family of facilities, whereas the 1962 Covenant certification relates solely to the projected net revenues from a single proposed facility, requiring considerably more precise a calculation and leaving considerably less leeway for error.

As Mr. Thompson testified:

> "The Section 7 certification 'Requires that the authority certify [at] the time of issuance of bonds for a new facility for the next ten years or during the life of the bonds, whichever shall be longer, in the light of its estimated expenditures; that it will not materially impair the sound credit standing of the authority or the investment status of consolidated bonds or the ability of the authority to fulfill its commitments.
>
> • • •
>
> "This [Section 7] is all in general qualitative terms, 'Materially impair the sound credit standing or the investment status of consolidated bonds or

> the ability of the Authority to fulfill its commitments.' 'Materially impair', I submit, is a phrase subject to considerable variation and interpretation particularly when it might be involved in a field where the political pressures are such as they are in the mass transit field and are such certainly as the investment community believes them to be in the mass transit field.
>
> "The Court: Now, would you compare that with the covenant requirement of the certification.
>
> "The Witness: The covenant is that they must certify that the project will, one, be self supporting." (A870-871).
>
> • • •
>
> "Now, self supporting, your Honor—although it sounds as though it can be a qualitative phrase is not, at least not in our business.
>
> "Self supporting means that the revenues shall be estimated to be at least as much as the operating expenses plus the debt service which is a mathematical requirement that does not appear in Section 7, which only requires certification that it will not materially impair and that's what I meant by more precise." (A872).

Under the Section 7 certification, the Commissioners could look to an anticipated growth in revenues of existing facilities to determine whether issuance of Consolidated Bonds for an additional facility would be a material impairment of the sound credit standing of the Port Authority. Under the Covenant test, the Commissioners would be required to examine but the single rail mass transit facility and would not be allowed to speculate regarding increased revenues from the other facilities operated by the Port Authority.

The objective importance of the Covenant as opposed to the other bondholder security provisions which remain unimpaired may be illustrated by a simple example. Prior

to the retroactive repeal of the Covenant, the non-federal share of the extension of PATH to Plainfield, New Jersey was to have been funded by an advance from the State of New Jersey. Following the retroactive repeal of the Covenant, the State of New Jersey reneged on its commitment to finance any part of the local share of the PATH extension. As a result, the Port Authority is now to bear all of the local share, presently estimated to require a diversion of pledged revenues and reserves of at least $128.4 million. (R-Ja 255-1). The 1962 Covenant would have completely blocked this diversion. The very fact that the Port Authority is proceeding with applications for Federal aid is a clear indication that no other provision of any statute or the Consolidated Bond resolution will block this diversion of pledged revenues and reserves. This pending diversion is the world of reality for bondholders and not an "abstract speculation." (See A128).

Appellees argue on the one hand that the 1962 Covenant is superfluous for bondholder protection and on the other that only by repeal of the Covenant can hundreds of millions of dollars of pledged revenues and reserves be diverted to rail mass transit. The first proposed diversion is of a total of $240,000,000 to be divided equally between the States of New Jersey and New York. (A528). In New Jersey it is expected that this amount will be applied toward the PATH extension to Plainfield, but in New York the State has not even formulated a plan to use these funds. In New Jersey the State has announced that if repeal of the Covenant is overturned by the courts the State will simply take up the slack and itself pay for the PATH extension to Plainfield. (A1128).

Appellees have sought to justify the diversion of Port Authority revenues by reference to an alleged windfall to the agency as a result of repeal:

> "The toll increase revenues, estimated at $40 million per year, will be used to finance mass transit projects that remained dormant while the Covenant stood. (See A80-84).
>
> • • •
>
> "Appellant's assertion that bondholders have lost $240 million of 'their' protection J.S. 24 fn., 18, is plainly contrary to fact. All of that money, and much more, will come from funds generated by the toll increase, not otherwise available to bondholders." (B[21] 12-13).

The toll increases upon which Appellees rely to sustain retroactive repeal of the Covenant in 1974 were instituted almost one year *after* repeal, and are not, even today, free from attack and possible reversal. The announcement of the toll increases in April, 1975 prompted these reactions:

1. The Governor of New York said that he was undecided whether to approve the increases.

2. The New Jersey Assembly and New Jersey Senate unanimously passed resolutions opposing the increases and calling for a gubernatorial veto. (New Jersey State Senate Concurrent Resolution No. 3016 (April 17, 1975); New Jersey State Assembly Resolutions Nos. 3009, 3010 (April 24, 1975)).

3. The New York State Senate passed a resolution urging Governor Carey to veto the increases. (New York State Senate Resolution No. 51 (April 15, 1975)).

4. The Governor of New Jersey said that he had not been consulted regarding the increases and then announced that he would veto the increases unless the Port Authority immediately reinstituted a commuter discount (thus encouraging additional automobile traffic), which the agency agreed to do.

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21. "B" references are to Appellees' brief in support of motion to dismiss appeal.

5. A member of Congress and other groups and individuals instituted a proceeding to challenge the increases as violative of the Federal Bridge Act of 1906 (34 Stat. 84).[21]

Appellees' repeated references to the estimated $40 million in new annual revenues from the toll increases are inexplicable in light of the fact that the Port Authority's own Annual Report[22] for 1975 flatly refutes any contention that the toll increases have materially enhanced the agency's net revenue or reserve position. The toll increases were instituted on May 5, 1975. At an alleged annual rate of $40 million in new net revenue approximately $26.7 million in new net revenue should have been realized by the Port Authority during 1975. While gross revenues increased by $48 million (versus a $37 million increase in the prior year), Port Authority revenues before debt service in 1975 increased by only $14.03 million (disregarding securities value adjustments), and surplus reserves in excess of mandated bonded debt service, which might be considered the true "surplus" of the Port Authority, rose from $23,570,000 to $23,866,000, an increase of only $296,000, not the $26,700,000 which supposedly was to be realized from the toll increases. Finally, operating expenses alone increased by over $37 million from 1974 to 1975, more than consuming any new revenues resulting from the toll increases.

2. *Retroactive repeal of the 1962 statutory Covenant adversely affected the secondary market for Port Authority*

21. This case, which if successful could result in a rollback of the toll increases, has not yet been decided. In April, 1976 the Federal Highway Administrator ordered that public hearings be held to review the toll increases.

22. A public document subject to judicial notice. *E.g., Bush Terminal Co.* v. *City of New York,* 282 N.Y. 306, 316 (1940); *see United States* v. *Louisiana,* 363 U.S. 1, 12-13 (1960); *Deutch* v. *United States,* 367 U.S. 456, 470 (1961); *cf.* Fed. R. Evid. 201(b).

Consolidated Bonds. A justifiable expectation of bondholders is that their investments will be marketable in the so-called secondary market for their obligations and will fluctuate in price according to variations in interest rates generally and in accordance with the financial prospects of the issuing agency. Implicit in this expectation is the understanding that the issuing agency or other responsible parties will not take action resulting in an adverse effect upon the market for the bonds. Retroactive repeal of the Covenant had exactly this adverse effect.

The damage to the secondary market caused by the retroactive repeal of the 1962 Covenant is evidenced by the resulting "thinness" of the markets for Port Authority bonds and the decline in prices for Port Authority bonds. Whereas Port Authority bonds prior to the repeal were readily marketable in large amounts at the generally quoted bid prices, after the repeal the market for Port Authority bonds became extremely "thin" and "sensitive" so that a sale of a large block of the bonds could not be made at the current bid price but only at a price substantially below it. (A 878, 879, 880, 887, 898). Also as a result of the repeal, the price of Port Authority bonds fell dramatically in the secondary market relative to other bonds formerly considered comparable in quality and intrinsic security. (A209, 212, 216, 883-887).[23]

The superior court found that there was no question but that immediately following repeal the market price for Port Authority bonds was adversely affected. The court

23. The secondary bond market measures materiality in hundredths of a point. A decline of 6 points represents the loss of, at the least, an entire year's interest or more on the bonds in question. For a single issue of $100 million of bonds, it represents a market loss of $6 million, and almost $2 billion of Port Authority Consolidated Bonds are presently outstanding.

went on to say, however, that the adverse effect attributable to the repeal was only temporary[24], citing the fact that the spread between Port Authority bonds and Massachusetts Port Authority bonds had narrowed by the date of trial to the same differential as had existed prior to the effective date of the repeal. The superior court also stated that there were other factors which contributed to the adverse price differential prevailing between Port Authority bonds and those of comparable issues, namely, newspaper articles critical of the Port Authority appearing in *The Wall Street Journal* and *The New York Times.* (A 110-113).

The superior court's conclusion as to the temporary nature of the damage to the secondary market is flatly contradicted by the record. That court ignored the expert testimony with respect to the "thinness" of the market resulting from repeal of the Covenant; it ignored the expert testimony explaining the convergence of the prices of the Port Authority bonds and the Massachusetts Ports; it ignored the expert testimony that the newspaper articles had no meaningful effect on the secondary market for Port Authority bonds; it ignored the fact that the dramatic increase in differential between the prices of Port Authority bonds and comparable toll road bonds has not diminished; and it ignored the unanimous testimony that, as a direct result of repeal of the Covenant, there is no longer a viable secondary market for Port Authority bonds.

Damage to the secondary market is evidenced by two separate factors: the thinness of the market[25] and the actual bid prices. The expert witnesses in fact testified that the size of the market is "more of a key factor" than

24. This conclusion ignores the fact that the market is nothing more than a compilation of sales. For every bondholder who had to sell at a depressed price, the damage certainly was permanent.

25. The three expert witnesses testified that the market for Port Authority bonds since the repeal is "unusually thin" (Mr. Thompson, A 879), "extremely thin" (Mr. Murphy, A 984, 997), and "very thin and very sensitive." (Mr. Fitzgerald, A 1093).

the quoted bid prices in measuring damage. (A 879; 997). This is particularly so in this case because the quoted bid prices for Port Authority bonds since the repeal are artificially high, because, as noted above, an attempted sale of any block of Port Authority bonds,[26] which could have been sold at the quoted price prior to repeal, would now force the quoted prices substantially lower. The volatility of the market for Port Authority bonds was dramatically demonstrated in January, 1975, by the sharp rise in prices for certain Port Authority bonds caused by purchases to cover short sales in the preceding month. Mr. Thompson testified:

> "The market has been adversely affected by the repeal. It is not possible to measure the adverse effect simply by comparing market prices I believe.
>
> "There was a time before the repeal when Port Authority bonds traded in the market very much as some of the other Authorities, major Authorities [or] State bonds do. And if a bank or insurance company with a five million dollar holding of those bonds came to a dealer and said: I want to sell these; what will you bid? He could get a bid that would be pretty much in line with the quoted market.
>
> "What we have now is a market that is usually thin. . . ." (A878-879).
>
> • • •
>
> "You could get a flow into the market by one of two things. One would be a brand new issue coming into the market. The other would be some investor who decided not to go along with this type of advice, but to sell his five or ten million dollar holdings. In my opinion in either one of those events the bid for

26. In July, 1976 the Port Authority issued and sold $100 million of Consolidated Bonds, Forty-second series. This was the first bond issue sold by the Authority since the retroactive repeal of the 1962 Covenant. It was saleable only to small "retail" purchasers since the institutions which traditionally purchased Port Authority bonds refused to purchase even at the interest rate on the issue of 8.2%, which is 2.7 percentage points above the previous issue of Port Authority bonds.

the bonds would be substantially below the market as it is quoted today." (A 879-880).

* * *

Mr. Thompson further testified that if the market were confronted with "large volume sales" of Port Authority bonds the prices for such bonds "would dip considerably further." (A 886-887). Finally, Mr. Thompson agreed with the trial court's observation:

> "The Court: With such a thin market for these bonds as you have described it after the repeal of the covenant, wouldn't the offer of a relatively small quantity of bonds have a greater effect upon the price than would otherwise be the case?
>
> "The Witness: I suspect that is true, yes." (A 898).

Mr. Murphy's testimony on this point was as follows:

> "I characterized the market as having substantial selling immediately after Governor Wilson's signing the repeal. Subsequent to that, dealers like ourselves maintained a low profile as far as long positions. The markets were extremely thin. As evidenced by what has happened in the last month [January, 1975], we have had a 20 point increase on very little supply. So when we talk about markets we're not only talking about quotations, we are talking about number of bonds traded, the size of the market which is more of a key factor than the quotes." (A 997).

The superior court referred to the testimony as to the thinness of the market (A 111), but discussed the damage to the secondary market solely in terms of the price activity of the bonds. Accordingly, its conclusion that the damage was temporary does not take into account the thinness factor. The seriousness of this oversight is compounded by the fact that, as the superior court recognized (A 108), most holders of Port Authority bonds are institutional investors (A 897-898) with large blocks of Port Authority bonds. These investors have lost the liquidity

for their bonds because of the thinness of the market resulting from the repeal of the Covenant. They have thus suffered substantial damage independent of the decline in prices, damage which the superior court simply ignored.

The superior court cited the convergence of the prices of Port Authority bonds and Massachusetts Ports at the time of the trial as support for its conclusion that the damage to the secondary market was not permanent. This assertion ignores expert testimony that explains the convergence as a technical adjustment caused by sellers covering their short positions. Messrs. Thompson and Murphy both testified that the closing of the gap between the bid prices of the two issues from late December 1974 to early February 1975 was attributable to short-term events, *i.e,* covering of short positions. (A 906, 985-987). Indeed, Mr. Murphy testified—from first hand knowledge—that the reason for the 20 point recovery of Port Authority '06's from late December 1974 to early February 1975 was that many dealers, including Barr Brothers, who had large short positions in these bonds "scrambled to try to cover their short position", resulting in a "short-term" technical situation.[27]

The superior court asserted that there were other factors which contributed to the adverse price differential between Port Authority bonds and those of comparable issues following repeal, citing in support of its statement two adverse newspaper articles. The record contradicts this conclusion. On cross-examination Appellees' counsel asked three of the expert witnesses whether the two articles could have caused the decline in the price of the Port Authority bonds and all three experts testified that the stories did not have any meaningful impact on the price of Port

27. It cost Barr Brothers in excess of 10 points to cover its short positions. (A 985-987).

Authority bonds. (A 889, 890, 891, 894, 895, 896, 897, 898, 899, 900, 1000, 1001, 1002, 1003, 1098, 1099, 1100). Moreover, while the superior court noted that Port Authority bonds suffered their sharpest decline during the one month period following *The New York Times* article, it failed to note that immediately prior to the *Times* article the spread in favor of the Massachusetts Ports was as high as 9 points, that immediately prior to *The Wall Street Journal* article the spread in favor of the Massachusetts Ports was as high as 6½ points (A209, 212), and that repeal of the Covenant was prominently featured in the *Times* article as one reason why the Port Authority had "fallen on hard times."

The superior court's opinion focused exclusively on the differential in prices between Port Authority bonds and Massachusetts Ports, but did not discuss the differential in prices between the Port Authority bonds and Indiana and Kansas Turnpike bonds, which the court also accepted as comparable issues. The fact is that the wide spread between the Port Authority bonds and the toll road bonds had not narrowed at the time of trial, and in the case of the Kansas Turnpike bonds had doubled since repeal. (A 216).

Finally and most importantly, the superior court brushed aside the unanimous and unequivocal testimony of all the witnesses that as a direct result of repeal of the Covenant there is no longer a viable secondary market for Port Authority bonds; institutional investors have rejected Port Authority bonds as a prudent investment.[29] (A 875, 876, 980, 981, 982, 983, 1092, 1093, 1105, 1106). For example, the two municipal bond dealers testified in part as follows:

29. Following the superior court's decision, Barr Brothers issued a report intended to increase investor interest in Port Authority Consolidated Bonds notwithstanding the decision. This attempt was unsuccessful; institutions continued to have no interest in the bonds and still today have no interest in the bonds. (A 1123).

Mr. Murphy:

> "Q. You spoke of investors. What effect did the repeal have on the attitude of investors towards Port bonds? A. Well, part of [our] function in the marketplace is to try to track certain relationships of various dollar bonds. We don't do any professional analysis or advice in the form of investment counseling. We merely provide markets and spread relationships, and we have found that for many years that you could, when certain spreads develop, that you could talk a customer into selling a bond and buying, let's say Ports, but we found that *subsequent to this repeal of the covenant, that most of the major institutions that we did business with, and I wouldn't say most, I don't know of any that would then buy Port Authority bonds. They crossed it off their list.*" (A 981) (emphasis added).
>
> • • •
>
> "We found that institutionally Port Authorities were no longer an acceptable exchange in that the investor, institutional-type of investor, sophisticated type investor would not any longer buy Port Authorities. If he was to sell a Kansas Turnpike or Indiana Turnpike wheretofore he would buy Ports when a certain spread relationship developed, he no longer would buy Ports.
>
> "Q. Without trying to name every one, which institutions do you refer to, what are the names of them? A. The names of the accounts?
>
> "Q. Yes. A. Well, I'd say Fireman's Fund, which is a large insurance company in San Francisco, major banks in Chicago, the First National Bank of Chicago, major banks in New York City, Bankers Trust Company, First National City Bank, insurance companies, the Connecticut General, the Hartford Fire Group and others." (A 981-982).

"Q. And those have been customers over the years as to Port bonds? A. That's correct.

"Q. You indicated in your testimony that there would be exchanges, you gave some examples. Do those have a name, those exchanges, trades? A. Swaps.

"Q. Exactly what does that entail and what are the reasons for it also? A. Well, to try to be simple, if that investor was able to sell, say, a million par value bonds at 80 and buy a very similar bond quality-wise intrinsically at 75, he might very often make the trade because from the proceeds from the sale, he is able to buy more bonds and therefore increase his income and in the case of the Ports, the spreads had widened to, in some of the trades, I recall, to 15 points or more but it was no longer a question of spread relationships. It was a turndown of the security based on how good the investor thought the intrinsic value of the Port bond had become after the repeal. (A 982-983).

Mr. Fitzgerald testified:

"Q. What effect did the legislation repealing the covenant have on your attitude and your firm's attitude towards Port bonds? A. A very negative effect in terms of that. It greatly restricted the amount of money we were willing to commit to the secondary and primary market. As soon as we became aware of the possibility of the repeal.

"I might add, that we were undoubtedly not alone in terms of this feeling. In other words, the feeling of the community was—we could determine that they were less willing to make commitments in terms of this and this had a great effect in the market in terms of the fact that the market was no longer as

viable a market as it had been prior to the repeal of the covenant. (A 1092).

• • •

"Q. What effect did the repeal have on the attitude of investors that you deal with in Port bonds?

• • •

"A. They no longer will either buy the bonds outright, nor will they buy them on swaps. This is true of customers such as Banker's Trust, United States Trust, Connecticut General, Fireman's Fund, First National Bank of Chicago, First National Bank of Louisville, and St. Louis Union. (A 1093).

The fear in the bond market engendered by the repeal of the Covenant is so pervasive that it has indirectly had a severely adverse effect on the market for other obligations of agencies of the States of New Jersey and New York.[29] (A 875, 987, 988, 1106). In fact, several large institutions have refused to purchase any bonds of any agencies of either of the two States as a result of the repeal of the Covenant. (A 875, 1106).

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29. Mr. Thompson testified in part: "The repeal of the covenant was recommended by the Governor of New Jersey approximately one week after sale of the $300 million Sports Complex issue. That issue was saleable at the time only because the Legislature had added the so-called moral obligation to its commitment.

"In my opinion—and I have heard no professional investment person who disagreed with this; in my opinion if that recommendation by the Governor had been made one week before the sale of the Sports Complex bonds instead of one week after, the bonds would not have been saleable; because the investment community was saying about the repeal of the covenant, and has said about it: If a legal covenant can be repealed by the States, what confidence can we place in their moral obligation?

"We have run onto this in an even broader field. My firm was the number two manager in a syndicate which last week underwrote $150 million and sold them of Power Authority bonds of the State of New York.

"Now the Power Authority is not dependent upon a moral obligation. It is dependent on its own revenues which are from the sale

II.

The 1962 Statutory Covenant Is Secure Against Impairment By Subsequent Legislative Action.

A State is competent to conclude contracts secure against any impairment by subsequent legislative action, even action taken under the guise of the State's police power. "[T]he right to make binding obligations is a competence attaching to sovereignty." *Perry* v. *United States*, 294 U.S. 330, 353 (1935). The 1962 statutory Covenant here in issue, a solemn undertaking between a State and its creditors, is a classic example of a contract secure against impairment.

The history of the Federal Contract Clause is instructive on the issue whether the contract here involved is secure against impairment. The reasons for its adoption have frequently been described by this Court. Widespread distress followed the Revolution, and the plight of debtors was desperate. State legislatures entered into so many unsavory schemes for the defeat of creditors and the impairment of contractual obligations that the total destruction of credit in the new nation was threatened. The restraining power of a central authority was a necessity. The need for, and general purpose of, the Contract Clause are eloquently summed up by Chief Justice Hughes in *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398 (1934), quoting *Odgen* v. *Saunders*, 25 U.S. (12 Wheat.) 213, 354-55 (1827) (Marshall C. J., dissenting):

> "The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government." 290 U.S. at 428.

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of electric power. It is about as far removed from any emotional, or as far removed from the feeling I just stated as anything could be. And yet we found in several parts of the country that there were many institutional investor portfolio managers who had themselves adopted or their investment committees had adopted a rule that there be no further investment in anything in New York State or New Jersey due to the repeal of the Covenant." (A 874-875).

The Contract Clause of the Federal Constitution was a conscious and deliberate cession of power by the States to the Federal Government, intended to deal with the general distrust and doubt that was so great that the best bonds could not be sold but at a discount of 30 or even 50%. H. C. Black, An Essay on the Constitutional Prohibitions Against Legislation Impairing The Obligation of Contracts, and Against Retroactive and Ex Post Facto Laws 6-7 (1887):

> "To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, — that contracts should be inviolable." *Id.* at 8.

Because the phrase "ex post facto laws" was not sufficiently comprehensive to ensure the protection intended by the framers, the specific provision against any law impairing the obligation of contracts was added "in order to give

perfect security to rights resting in contract." *Id.* at 9. As Madison says in THE FEDERALIST: "[L]aws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation." THE FEDERALIST, No. 43, at 310 (H. Dawson ed. 1863).

On occasion, contracts through judicial interpretation have been found to be subject to subsequent legislative impairment as a proper exercise of a State's police powers. But where, as here, the contract is between the the States and creditors of the State agency, it is settled that the States may not thereafter act in derogation of their solemn undertaking. This principle was established in a series of cases following the Civil War which established that a State may not unilaterally pass a law modifying material terms of outstanding debt obligations issued by the State or by its agencies. *Von Hoffman* v. *City of Quincy,* 71 U.S. (4 Wall.) 535 (1866), was an action to compel the City of Quincy, Illinois to levy taxes to pay unpaid interest on bonds issued in the 1850's pursuant to statutes authorizing the city to levy taxes to pay the interest. An act of the Illinois legislature passed in 1863 limited the taxing power of Quincy to pay its debts and operating expenses. This Court held that the 1863 Act violated the contract clause:

> "When the bonds in question were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist." *Id.* at 554.

Wolff v. *City of New Orleans,* 103 U.S. 358 (1880), was an action to compel the city to enforce payment of a judgment against it based on its failure to pay the principal of plaintiff's city bonds originally issued in the 1850's. An 1876 Louisiana statute repealed the legislation authorizing the levying of a special tax for payment of the bonds in effect at the time the bonds were originally issued. This Court held the 1876 Act unconstitutional notwithstanding a claim by the city that it constituted a valid exercise of the State's sovereign power to meet the emergency and chaotic financial situation which then and for several years had existed in New Orleans. Citing *Von Hoffman* v. *City of Quincy,* 71 U.S. (4 Wall.) 535 (1866), the Court said in part:

> "It is equally clear that where a State has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State, and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other. . . . The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the State, and to those of its agents acting under its authority, as well as to contracts between individuals. And that obligation is impaired, in the sense of the Constitution, when the means by which a contract at the time of its execution could be enforced, that is, by which the parties could be *obliged* to perform it, are rendered less efficacious by legislation operating directly upon

those means. As observed by the court in the case cited, 'without the remedy the contract may indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution. The obligation of a contract 'is the law which binds the parties to perform their agreement.'" 103 U.S. at 367-68.

In *Louisiana* v. *Pilsbury,* 105 U.S. 278 (1881), this Court again reviewed the 1876 Louisiana statute which repealed the 1852 special tax act pursuant to which the relator's bonds had been issued. The 1876 statute was passed in light of a clear emergency in the State and the city:

> "It [the 1876 statute] recites in its preamble that the total debt of the city, bonded and floating, exceeds $23 million; that the taxable property of the city has become so reduced in value as to require a tax at the rate of at least five per cent per annum to liquidate the debt; that the levying of a tax at so exhorbitant a rate will render its collection impossible; that the continuation of a tax beyond the ability of the property to pay would lead to a further destruction of the assessable property of the city and to ultimate practical bankruptcy; and that the council of the city have adopted a plan for the liquidation of its indebtedness, looking to the payment of its creditors in full, 'obtaining thereby the indulgence necessary for the public well-being and the maintenance of the public honor.'" *Id.* at 298.

Notwithstanding this emergency situation, which, it should be emphasized, was clearly described in the preamble to the statute, the Court held the 1876 statute to be void as an impairment of the obligation of contracts. *See*

Hawthorne v. *Calef,* 69 U.S. (2 Wall.) 10 (1864); *Planters' Bank* v. *Sharp,* 47 U.S. (6 How.) 301 (1848); *Green* v. *Biddle,* 21 U.S. (8 Wheat.) 1 (1823); *Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87 (1810).

The next occasion for the Court to consider the special sanctity accorded to contracts between a State and its creditors or the creditors of its agencies occurred during the great depression of the 1930's, where the "gold clause" cases clearly set forth the distinction between private contracts and public contracts.

The difference in result in *Norman* v. *Baltimore & Ohio R.R.,* 294 U.S. 240 (1934), and *Perry* v. *United States,* 294 U.S. 330 (1934), illustrates this principle. In *Norman,* the Supreme Court held that Congress' power to establish a monetary system under the United States Constitution permitted Congress to alter retroactively a "gold value" clause in contracts between private parties. In *Perry,* however, decided in the same term, the majority opinion by Chief Justice Hughes, who also wrote the majority opinion in *Norman,* reached the opposite result as to the federal government's debt obligations. The Court held that such power of Congress could not retroactively change the "gold value" clause in the federal government's own bond obligations. In language appropriate to the present situation, Chief Justice Hughes said:

> ". . . The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government, — upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of

money borrowed, the Congress has not been vested with authority to alter or destroy those obligations.

• • •

"There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers." 294 U.S. at 350-351, 353-54.

Although the *Perry* case did not involve the state police power it did involve the greater police power of the Federal Government, in a nationwide emergency caused by the depression. A legislature cannot retroactively alter or repudiate the substance of such constitutionally authorized engagements if the Contract Clause is to have any meaning. *Lynch* v. *United States,* 292 U.S. 571 (1934); *McGahey* v. *Virginia,* 135 U.S. 662 (1890); *Farrington* v. *Tennessee,* 95 U.S. 558 (1877); *Borough of Fort Lee* v. *United States ex rel. Barker,* 104 F.2d 275 (3d Cir. 1939); *Moore* v. *Otis,* 275 F. 747 (8th Cir. 1921); *Fazende* v. *City of Houston,* 34 F. 95 (E.D. Tex. 1888); *Maenhaut* v. *City of New Orleans,* 16 Fed. Cas. No. 8939 (D.La. 1875); *Brown-Crummer Investment Co.* v. *Town of North Miami,* 11 F. Supp. 73 (S.D. Fla. 1935); *Hubbell* v. *Leonard,* 6 F. Supp. 145 (E.D. Ark. 1934); *City of Little Rock* v. *Community Chest of Greater Little Rock,* 204 Ark. 562 (1942); *State* v. *City of Pensacola,* 40 So. 2d 569 (Fla. Sup. Ct. 1949); *First National Bank* v. *Maine Turnpike Authority,* 156 Me. 131 (1957); *State Highway Commissioner* v. *Detroit City Controller,* 331 Mich. 337 (1951); *Patterson* v. *Carey,* 83 Misc. 2d 372 (N.Y. Sup. Ct. 1975); *Ruano* v. *Spellman,* 81 Wash. 2d 820 (1973). These cases establish the principle that where

a State elects to do so it is competent to enter into a contract with its creditors secure against subsequent impairment by the later action of the legislature. This is a sound principle; our capital markets cannot operate if municipal obligors are empowered to pick and choose among those security devices they wish to honor whenever it is deemed politically fashionable to do so.

III.

If the 1962 Statutory Covenant is Subject to the States' Police Power, Repeal of the Covenant Was Not an Exercise of the Police Power.

Even if this Court were to conclude that the 1962 statutory covenant is subject to subsequent legislative impairment by the States through an exercise of the States' police power, then the State of New Jersey has not offered any credible evidence to show that the repeal was in fact an exercise of the police power of the State.

It is not seriously disputed that the 1962 Covenant constitutes a contract within the meaning of the constitutional protection securing such agreements from subsequent legislative impairment. While legislation which is in fact an exercise of the police power is generally presumed reasonable (*e.g., City of El Paso* v. *Simmons,* 379 U.S. 497, 508-509 (1965); *East New York Savings Bank* v. *Hahn,* 326 U.S. 230, 232-233 (1945)), Appellees did not present any credible evidence that the repeal was in fact an exercise of the State's police power or was enacted to express some legitimate State interest. *See Roe* v. *Wade,* 410 U.S. 113, 155 (1973); *Planned Parenthood Association* v. *Fitzpatrick,* 401 F.Supp. 554, 564 (E.D. Pa. 1975). It is clear that repeal of the Covenant was in fact the result of a change in attitude by politicians in both States with respect to the mission

of the Port Authority—the result of a vague and inaccurate impression that the agency was intended to solve the passenger transportation as well as the freight transportation difficulties of the Port District. This change in attitude, based upon a mistaken reading of the Port Authority's Compact and ignorance of the history of the Port Authority, clearly cannot justify the repeal of the Covenant on the grounds that the repeal legislation is an exercise of the police power of the State. Appellees have constructed an imaginary case for an exercise of the police power which case, however, has no real existence. No one disputes the coincidental coexistence of energy and environmental problems at the time the Covenant was retroactively repealed. Appellant stipulated to this. But to say that the Legislature made reference to such concerns when it passed Chapter 25 of the Laws of 1974 is to equate coincidence with reality. This is reality:

1. Repeal was the culmination of a campaign pledge made by Candidate Byrne in June, 1973, six months before the energy crisis which is now used to justify repeal.

2. The legislation itself is silent as to any supposed emergency as a reason for its existence. If the legislature in fact had any energy or environmental concern in mind when they repealed the Covenant, surely there would have been some reference to it.

3. A review of the extraordinary publicity accorded the repeal shows only a handful of references to any connection between repeal and any energy or environmental problem. No legislative or public hearings were held.

4. Governor Byrne did not mention any energy or environmental problem when he signed the repealer.

5. Governor Wilson said that he signed the repealer with "great reluctance" and only to put the issue of the Covenant's validity before the courts.

This is not a police power case at all. It is a test case to determine whether a statutory agreement between a State and creditors of a State agency can arbitrarily be cancelled whenever deemed expedient by the politicians then in office.

IV.

Even If the Retroactive Repeal of the 1962 Statutory Covenant is Considered an Exercise of the Police Power, Judicial Precedents Do Not Support its Constitutionality under the Contract and Due Process Clauses.

The superior court erred in holding that the repeal of the Covenant was justified as an exercise of the State's police power. It conceded that repeal "permits a diminution of the pledged revenues and reserves and may be said to constitute an impairment of the State's contract with the bondholders." (A 114).

The holding that the repeal was an exercise of the police power and, therefore, constitutional, notwithstanding the conceded impairment, is erroneous and is based on a misapplication and mis-interpretation of language derived from *W. B. Worthen Co.* v. *Kavanaugh,* 295 U.S. 56 (1935). The superior court stated the test of constitutionality as follows:

> "Conceding the existence of some impairment of bondholder security as a result of the repeal, has the action of the States destroyed the quality of their security as an 'acceptable investment for a rational investor'?" (A 126-127).

Kavanaugh involved bonds issued by an Arkansas municipal improvement district secured through mortgage benefit assessments provided by statute. The challenged legislation substantially reduced interest and penalties payable on default, greatly extended the time in which the property could be sold on default, and permitted the property owner to remain in possession, with an extended right of redemption, without accounting for rents. Mr. Justice Cardozo, speaking for this Court, held that in enacting the challenged legislation, the legislature had "put restraint aside" and "[w]ith studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor." *Id.* at 60. He specifically noted that the changes wrought by the challenged legislation were so substantial that the State had transgressed the "outermost limits" of constitutional bounds.

> "In the books there is much talk about distinctions between changes of the substance of the contract and changes of the remedy. . . . The dividing line is at times obscure. There is no need for the purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. . . . *We state the outermost limits only. In stating them we do not exclude the possibility that the bounds are even narrower.* The case does not call for definition more precise. A catalogue of the changes imposed upon this mortgage must lead to the conviction that the framers of the amendments have put restraint aside. With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor. *Id.* at 60 (emphasis added).

The superior court adopted these "outermost limits" as its sole standard for determining the constitutionality of the 1974 Legislation. According to the superior court's rationale, any impairment by the State which falls short of the "outermost limits," is constitutionally valid. What to this Court was an unconstitutional maximum has been turned into a required minimum.

If only those acts of the State which resulted in the destruction of a contract as an acceptable investment were constitutionally impermissible, virtually no covenant or combination of covenants in a bond resolution or statute would be safe from abrogation. There are innumerable covenants and provisions in bond resolutions and statutes, the abrogation of which would not "destroy" the bond's security, but which obviously would result in material impairment of it. Even measured by the "outermost limits" of *Kavanaugh* repeal of the Covenant is constitutionally offensive. There the basic legislation remained; here the States' pledge has been unilaterally wiped from the statute books. Further, the "rational investors" who testified below all said that to them and their customers Port Authority bonds without the Covenant were not an acceptable investment. (See *supra* pp. 22-26).

The superior court held:

> "The line of demarcation between *Blaisdell* and *Kavanaugh* may be expressed as one of degree: The state's inherent power to protect the public welfare may be validly exercised under the Contract Clause even if it impairs a contractual obligation *so long as it does not destroy it.*" (A 121) (emphasis added).

This extreme view is not held by this Court. It cannot be concluded that the framers of the Constitution of the United States meant "destroy" when they said "impair."

Home Building & Loan Association v. *Blaisdell,* 290 U.S. 398 (1934), is cited by the superior court in support of its position as illustrative of an impairment short of destruction and, therefore, constitutional. *Blaisdell,* however, is

distinguishable from this case, and in no way a precedent against it.

In *Blaisdell,* the Minnesota Mortgage Moratorium Law which took effect on April 18, 1933, provided that sales could be postponed and periods of redemption extended only during the emergency declared to exist. In no event was the act to remain in effect after May 1, 1935, and any postponement of a sale or period of redemption would have to expire on that date. The court could also direct that during any extension the mortgagor must pay all or a reasonable part of the property's income or fair rental value for the payment of taxes, insurance, interest and mortgage indebtedness, thus giving the institutional lenders, who had no real interest in actual possession, the practical equivalent of possession. The state court upheld the statute as an emergency measure. It conceded that the obligations of the mortgage contract were impaired, but decided that, notwithstanding the Contract Clause of the Federal Constitution, the statute was within the police power of the state by reason of the public economic emergency which the legislature had found to exist. It relied upon the preamble and first section of the statute, which described the existing emergency in terms which it held justified the temporary relief afforded by the statute.

Blaisdell is distinguishable from this case on many grounds. The contract involved was a private contract; a state of emergency was found by the legislature and expounded in the statute; the impairment was temporary; the relief was granted upon reasonable conditions; and the impairment did not affect the integrity of the obligation.

As noted above, there have been cases in which the impairment of a contract between private parties by a state legislature in the exercise of its police power has been permitted. It is settled, however, that a state may not impair its own contract with its citizens. The only exception to this rule is *City of El Paso* v. *Simmons,* 379 U.S. 497 (1965), which involved a unique set of facts and which is distinguishable on other grounds. (See *infra* pp. 72-78). The position of Chief Justice Hughes on this point is interesting. He wrote the majority opinion in *Blaisdell* in 1934 and in *Norman* v. *Baltimore & Ohio R.R., supra* and *Perry* v. *United States, supra,* the "gold clause" cases, on the same day in 1935. Two of these cases, *Blaisdell* and *Norman,* involved private contracts, and the impairment by the State was permitted; *Perry* involved impairment by Congress of its own contract, and the attempt was held to be unconstitutional.

After nine introductory clauses expounding the emergency conditions in the state, the challenged Minnesota Mortgage Moratorium Law in *Blaisdell* provided:

> "Section 1. *Emergency Declared to Exist.* — In view of the situation hereinbefore set forth, the Legislature of the State of Minnesota hereby declares that a public economic emergency does exist in the State of Minnesota. 290 U.S. at 422 n.3.

The state court held that there were sufficient facts upon which to base such a finding, and this Court approved. Chief Justice Hughes devoted four pages and voluminous footnotes in his opinion (*Id.* at 420-424) to the legislative finding of a state of emergency and emphasized the importance of such a finding in his decision of the case. The contrast is marked between the exhaustive treatment of the crisis in *Blaisdell* and the absolute and complete silence in the repeal legislation here.

Chief Justice Hughes stressed nothing more in his opinion than the temporary nature of the impairment. He said in part:

> "In determining whether the provision for this *temporary* and conditional relief exceeds the power

> of the State by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisdiction of this Court in the construction of that clause, and the principles of construction which we may consider to be established." *Id.* at 425 (emphasis added).

and again:

> ". . . But it does not follow that conditions may not arise in which a *temporary* restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and *temporary* interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. . . ." *Id.* at 439 (emphasis added).

and again:

> ". . . And if state power exists to give *temporary* relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other economic causes. . . ." *Id.* at 439-440 (emphasis added).

He concluded:

> "5. The legislation is *temporary* in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts." *Id.* at 447 (emphasis added).

In *Blaisdell,* this Court upheld the impairment because the relief was granted on reasonable conditions, the integrity of the obligations remained intact and the end to be accomplished was legitimate.

The Minnesota legislation required that sales could only be postponed, and rights to redemption extended, during the emergency or for two years, whichever period was shorter. It also provided that the mortgagor must pay rent during the extension period—the practical equivalent of possession. Chief Justice Hughes said:

> "The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The Statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment, if the mortgagor fails to redeem within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered. While the mortgagor remains in possession he must pay the rental value as that value has been determined, upon notice and hearing, by the court. The rental value so paid is devoted to the carrying of the property by the application of the required payments to taxes, insurance, and interest on the mortgage indebtedness. While the mortgagee-purchaser is debarred from actual possession, he has so far as rental value is concerned, the equivalent of possession during the extended period." *Id.* at 425.

Compare these reasonable conditions for the granting of relief in *Blaisdell* to this case. In the first place, the relief here runs to the State which passed the repealer. The State has an obligation to provide adequate mass transit

for its citizens. This is expensive. By diluting bondholders' security, the State relieves itself of part of the cost. In other words, the recipients of the benefits from the impairment are not poverty-stricken, desperate farmers in the depths of the Depression, but the sovereign States of New Jersey and New York! In the second place, as opposed to the reasonable conditions in *Blaisdell,* in this case there are no conditions—the impairment is absolute, complete and everlasting. This is a very important distinction because it means that the case at bar is controlled by *Bronson* v. *Kinzie,* 42 U.S. (1 How.) 311 (1843) rather than by *Blaisdell.* Chief Justice Hughes distinguished *Bronson* as follows:

> ". . . In *Bronson* v. *Kinzie,* 1 How. 311, state legislation, which had been enacted for the relief of debtors in view of the seriously depressed condition of business, following the panic of 1837, and which provided that the equitable estate of a mortgagor should not be extinguished for twelve months after sale on foreclosure, and further prevented any sale unless two-thirds of the appraised value of the property should be bid therefor, was held to violate the constitutional provision. It will be observed that in the *Bronson* case, aside from the requirement as to the amount of the bid of the sale, the extension of the period of redemption was unconditional, and there was no provision, as in the instant case, to secure to the mortgagee the rental value of the property during the extended period. *McCracken* v. *Hayward,* 2 How. 608, *Gantly's Lessee* v. *Ewing,* 3 How. 707, and *Howard* v. *Bugbee,* 24 How. 461, followed the decision in *Bronson* v. *Kinzie;* that of *McCracken,* condemning a statute which provided that an execution sale should not be made of property unless it would be two-thirds of its value according to the opinion of three householders; that of *Gantly's Lessee,* condemning a statute which required a sale for not less than one-half of the appraised value; and that of *Howard* making a similar ruling as to an unconditional extension of two years for redemption from foreclosure sale. . . ." 290 U.S. at 431-32 (footnote omitted).

The dissent had this to say about the distinction between *Bronson* and *Blaisdell:*

> ". . . this postponement, [of the period of redemption] if it had been unconditional, undoubtedly would have constituted an unconstitutional impairment of the obligation. This court so decided in *Bronson* v. *Kinzie, supra,* where the period of redemption was extended for a period of only twelve months after sale under the decree; in *Howard* v. *Bugbee, supra,* where the extension was for two years; and in *Barnitz* v. *Beverly, supra,* where the period was extended for eighteen months. Those cases we may assume, still embody the law, since they are not overruled.
>
> "The only substantial difference between those cases and the present one is that here the period of extension of redemption and postponement of the creditors ownership, is accompanied by the condition that the rental value of the property shall, in the meantime, be paid." *Id.* at 480-481.

Reasonable conditions may involve not only rental payments during the period of postponement, but also requirements that the impairment be temporary and confined to the period of emergency.

Chief Justice Hughes said:

> "Whatever doubt there may have been that the protective power of the State, its police power, may be exercised—without violating the true intent of the provision of the Federal Constitution—in directly preventing the immediate and literal enforcement of contractual obligations, by a *temporary and conditional restraint,* where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing." *Id.* at 440. (emphasis added).

In discussing the lease cases, the Court went on to observe that the relief afforded there was temporary and conditional, that it was sustained because of the emergency due to scarcity of housing, and that provisions were made for reasonable compensation to the landlord during the period he was prevented from regaining possession. The Court also decided that while the declaration by the legislature as to the existence of the emergency was entitled to great respect, it was not conclusive; and, further, that a law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends. *Id.* at 441-442. *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543, 547, 548 (1924).

If it can be said in the case at bar that the ends to be accomplished are improvement in mass transit, decrease in air pollution and conservation of energy, it must be granted that they are legitimate. But they are not, in fact, the end sought by this legislation. They are after the fact arguments seized upon by Appellees to defeat this lawsuit. The true end of the repeal legislation was to siphon off imaginary Port Authority surplus into mass transit, thus relieving the State of the necessity of finding the funds elsewhere. The State found it more convenient to repudiate its word and invade the bondholders' security than to raise the money through unpopular taxation.

In addition, the relief must be appropriate. The crises allegedly influencing the legislators involved energy and pollution. These problems can only be attacked by reducing vehicular traffic partially through the improvement of mass transit. But the improvement of mass transit does not require violation of the States' covenant with bondholders. Mass transit is not only the responsibility of the

States; it is a responsibility the States agreed not to pass on to the bondholders. As discussed elsewhere, there are a multitude of ways for the States to bear this burden without violating the Federal Constitution.

Enough has been said to make clear that the integrity of the obligation from the State to the bondholders has been impaired. Appellees have argued below that the bondholders are only entitled to payment of interest and the repayment of principal, and the ability of the Port Authority to do both allegedly has not been impaired. It must be an alarming thought to bondholders in this country that all the covenants and protection in a bond are worthless if the obligor decides that principal and interest payments can be made without one or more of them. The decision, of course, is made unilaterally by the obligor!

The bondholders are dependent upon Port Authority revenues. They thought they were safe from inroads from additional perpetual mass transit deficits. Suddenly, without warning or notice, the Covenant is repealed and their only protection is the grossly inadequate 1.3 test and Section 7 of the Series resolutions which puts them at the mercy of an opinion of Commissioners who, when last called upon in connection with the PATH takeover, were wrong by a factor of five. Already, as stated above, it is planned to divert $240,000,000, with no end in sight.

The other depression cases support this interpretation of the Contract Clause. For example, in *Veix* v. *Sixth Ward Building & Loan Association,* 310 U.S. 32 (1940), the State's building and loan associations were faced with insolvency and statutes extending the withdrawal rights of certificate holders were upheld on the theory that the certificate holders had purchased their shares while statutory requirements were in effect and were subject to further legislation on the same topic. The Court expressly found that the weakness in the State's financial system caused by the emergency of the depression remained.

In *Faitoute Iron & Steel Co.* v. *City of Asbury Park,* 316 U.S. 502 (1942), plaintiff alleged that the New Jersey Municipal Finance Act, adopted in 1931, effected an unconstitutional impairment of the obligation of contract. Under the Act, plans were formulated for the adjustment or composition of the claims of creditors of insolvent municipalities in New Jersey. These plans were binding on all creditors if approved by the municipality, by a Municipal Finance Commission and by creditors representing 85 percent of the indebtedness affected, and if, in addition, they were adopted by the New Jersey Supreme Court. In 1935, the City of Asbury Park became insolvent and availed itself of the provisions of the Act. A plan for the refunding of its bonded debt was finally approved and put into operation in 1938. The plaintiffs were holders of defaulted bonds acquired prior to the adoption of the Act. Under the plan, plaintiffs' bonds were converted into new bonds maturing at a later date and bearing a lower rate of interest than the original bonds. Plaintiffs alleged that the Act under which the plan was formulated was in violation of the Contract Clause.

This Court found that there had been no impairment of contract, noting in its opinion that the Constitution was "'intended to preserve practical and substantial rights . . .'." 316 U.S. at 514. The Court's decision was clearly motivated by the fact that without the adoption of the plan the plaintiffs would not have received as much on account of their bonds:

> "Impairment of an obligation means refusal to pay an honest debt; it does not mean contriving ways and means for paying it." *Id.* at 511.

In *East New York Savings Bank* v. *Hahn,* 326 U.S. 230 (1945), moratorium legislation similar to that in *Blaisdell* had been enacted by New York in 1933 and had been extended year by year to 1943. The extensions had been

prompted by joint legislative committees which made thorough studies and recommended continuance of the moratorium. The 1941 extension had added to the requirements of payment of taxes, insurance and interest, the amortization of principal at the rate of 1% per annum. The 1943 legislation increased the amortization rate and was enacted only following another legislative committee's recommendation.

> "The whole course of the New York moratorium legislation shows the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts. The New York Legislature was advised by those having special responsibility to inform it that "the sudden termination of the legislation which has dammed up normal liquidation of these mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate.'" *Id.* at 234-35.

In addition to its misconception of *Kavanaugh,* the superior court misapplied *City of El Paso* v. *Simmons,* 379 U.S. 497 (1965), the case "upon which the defendants place greatest reliance." (A 122).

Briefly, the facts in *El Paso* were as follows: In 1910, the State of Texas sold public land to plaintiff's predecessor in title in accordance with a State policy of selling such lands to raise funds for public schools. The purchase money mortgage contract was extremely favorable to the purchaser. In practice, the payment of principal was periodically postponed and, in fact, was never called due. The State retained a right of forfeiture if the owner failed to pay interest, but the owner or his vendees were entitled to reinstatement, provided no rights of third persons had intervened. The right to reinstatement was

therefore defeasible, and the State always had pursued a policy of quick resale of the forfeited lands to a third party, thus cutting off the right to reinstatement. In 1941, legislation was enacted providing that the right of reinstatement had to be exercised within five years from the date of forfeiture or from the effective date of the act, whichever was later. Plaintiff, who filed his application for reinstatement more than five years after the date of forfeiture, filed suit to determine title to the land, claiming that the 1941 legislation violated the Contract Clause.

The 1941 remedial statute was essentially prospective in its effect; indeed, it is this circumstance which led this Court to its final conclusion:

> "The measure taken to induce defaulting purchasers to comply with their contracts, requiring payment of interest in arrears within five years, was a mild one indeed, hardly burdensome to the purchaser who wanted to adhere to his contract of purchase, but nonetheless an important one to the State's interest." 379 U.S. at 516-517.

In the present case the Port Authority bondholders, in direct contrast, were holders of an absolute right under the 1962 Covenant, applicable during the stated period the bonds are outstanding and not defeasible by subsequent action by the State.

In *El Paso*, this Court emphasized the conjectural nature of the reinstatement rights there involved,[31] and carefully carved out a narrow exception to the rule that a State may not repudiate its own obligations through the exercise of its police power. The superior court did not deal with this

31. The Court stated: "*Assuming* the provision for reinstatement after default to be part of the State's obligation, we do not think its modification by a five-year statute of repose contravenes the Contract Clause." *Id.* at 508 (emphasis added). The Court denigrated the value of the unlimited reinstatement right throughout its opinion. See *id.* at 506 n. 9, 509, 514-15.

Court's careful explanation of the extraordinary circumstances which existed in *El Paso*. As shown below, the factors and circumstances on which this Court relied in *El Paso* to justify the use of the police power to repudiate the State's own obligations are not found in the present case.

The Court in *El Paso* upheld the modification of the right to reinstatement only after finding the existence of *all* of the following factors:

(a) The challenged legislation was the only means to accomplish the purpose of the legislature to safeguard the vital interests of the people. *Id.* at 512-13;

(b) The right to reinstatement was not a substantial inducement to buyers entering into the contracts. *Id.* at 514;

(c) The buyers could not, and did not, expect the unlimited right to reinstatement to be of everlasting effect. *Id.*;

(d) There had been a substantial change in circumstances during the more than 40 year period between the enactment of the legislation embodying the right to reinstatement and the enactment of the legislation modifying that right. *Id.* at 511, 516;

(e) Unforeseen and unexpected developments conferred considerable advantages on the buyer and costly and difficult burdens on the State. *Id.* at 515;

(f) The challenged legislation merely restricted buyers to those gains reasonably to be expected from the contracts. *Id.*; and

(g) The right to reinstatement was merely modified, not abrogated and the five-year statute of repose was a mild measure "hardly burdensome to the purchaser who wanted to adhere to his contract of purchase. . . ." *Id.* at 516-517.

1. Repeal of the 1962 Covenant was not the only way to meet the problems of mass transit, or pollution, or energy conservation.

In *El Paso* the State of Texas enacted the challenged legislation only after it had unsuccessfully attempted to alleviate the problems directly created by the right to reinstatement by other legislation. *Id.* at 512-13.[32] Only after this legislation proved unsuccessful did the State of Texas enact the challenged legislation by which the State could "restore confidence in the stability and integrity of land titles and * * * enable the State to protect and administer its property in a businesslike manner." *Id.* at 511-12.

In the present case, the State abrogated the Covenant, not because it was the only means to meet mass transit and related problems, but purely and simply in order to avoid having to pay for the solutions to those problems. A desire to "lessen government expenditure" is not a sufficient excuse for abrogating contracts. *Lynch* v. *United States*, 292 U.S. 571, 580 (1934):

> "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United

32. "The attempts to assure some stability in land sales through repurchase acts, allowing delinquent owners a preferential right to buy forfeited land at a reappraised value, and, under one act, without payment of accumulated interest in arrears, proved unsuccessful, and expensive." *Id.* at 512-13.

> States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.' *Sinking-Fund Cases*, 99 U.S. 700, 719."

In the instant case, there are numerous ways in which the State could deal with the problems of mass transit, pollution and energy conservation, utilizing the expertise and management of the Port Authority but without repealing the Covenant. As one example, the Port Authority could assist in providing the State of New Jersey with efficient commuter railroads if the State would only agree to stand behind the necessary financing, as the State of New York elected to do in connection with the Port Authority's Commuter Car Program. The stumbling block is not the Covenant; it is the State's desire to use as its own the revenues and reserves of the Port Authority pledged to bondholders.

2. The existence of the 1962 Covenant, and the justifiable expectation of the continuance of the protection afforded by the Covenant, were substantial inducements to public investors purchasing Port Authority bonds.

In *El Paso* the Court said that (a) the buyer was not "substantially induced" to enter into his contract on the basis of a defeasible right to reinstatement, and (b) the buyer did not interpret the reinstatement right "to be of everlasting effect." *Id.* at 514.

As to the issue of "substantial inducement," the trial court found that "the record supports the plaintiff's claim that investors relied on the Covenant in purchasing Authority bonds," (A 110) although concluding that the Covenant was not a "primary consideration" for the purchases. The refutation of this theory is set forth above (*supra* pp. 21-24).

3. Purchasers of Port Authority bonds justifiably expected the Covenant to remain in effect as long as affected bonds remained outstanding.

In *El Paso* the Court found that the buyer did not interpret his right to be of everlasting effect. 379 U.S. at 514. In determining whether the right was "practical and substantial" rather than theoretical, the Court also asked whether there was an expectation the right would continue to exist:

> "We do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of a defeasible right to reinstatement in case of his failure to perform, *or that he interpreted that right to be of everlasting effect.* At the time the contract was entered into the State's policy was to sell the land as quickly as possible, and the State took many steps to induce sales. [Citation omitted]. Thus, for example, the Land Commissioner was required to reclassify forfeited lands by the next sale day and to publicize widely the forfeiture and sale. [Citation omitted]. This policy clearly indicates that the *right of reinstatement was not conceived to be an endless privilege conferred on a defaulting buyer.* A contrary construction would render the buyer's obligations under the contract quite illusory while obliging the State to transfer the land whenever the purchaser decided to comply with the contract, all this for a nominal down payment. We, like the Court in *Faitoute Iron & Steel Co.* v. *City of Asbury Park,* 316 U.S. 502, 514, believe that '[t]he Constitution is intended to preserve practical and substantial rights, not to maintain theories.' *Davis* v. *Mills,* 194 U.S. 451, 457." *Id.* at 514-15 (emphasis added).

The superior court ignored the fact that Port Authority bondholders justifiably expected the Covenant to remain in effect so long as "affected bonds" remained outstanding. A key provision of the Covenant is that "so long as any of

such [affected] bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the Port Authority" the Covenant would endure. The Covenant was described by the Farley Committee (A 656), and the Port Authority as a legally enforceable, constitutionally protected agreement (A 861, 939), and professional investors and advisors believed that the Covenant was "protected by the Impairment Clause of the Constitution." (A 879).

4. There have been no unforeseen or unexpected developments between 1962 and 1974 which would justify repeal of the Covenant.

This Court in *El Paso* emphasized the dramatic, historical changes which had occurred in Texas between 1895, when the original legislation was enacted, and four and one-half decades later, when the challenged legislation was enacted:

> "[E]ventually the evolution of a frontier society to a modern State, attended by the discovery of oil and gas deposits which led to speculation and exploitation of the changes in the use and value of the lands, called forth amendments to the Texas land laws modifying the conditions of sale in favor of the State. 379 U.S. at 511.
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> "The program adopted at the turn of the century for the sale, settlement, forfeiture and reinstatement of land was not wholly effectual to serve the objectives of the State's land program many decades later." *Id.* at 516.

In the present case, there have been no unforeseen or unexpected developments since 1962. Quite the contrary, continuing traffic and rail mass transit difficulties were not only foreseen but were expected in 1962. In fact, it was the probability of such difficulties that prompted investors to

demand, and the State to enter into, the 1962 Covenant. The problems had existed for years and had been described from the 1920's on by various commissions and knowledgeable individuals as: "disastrous" (1925 Report of the North Jersey Transit Commission; Stip. 71-72); "an acute present problem, the solution of which is vital to the welfare of an army of our citizens." (1927 Report of the North Jersey Transit Commission; Stip. 79); "the need for a very broad solution thereof becomes a paramount necessity today." (Letter of Commissioner, New Jersey Department of Conservation and Economic Development of the Governor, dated February 10, 1961; Stip. 91); "Transit in the New York-New Jersey Metropolitan Area is on the brink of catastrophe." (1955 Report of Metropolitan Rapid Transit Commission; Stip. 100); "The moment when further forgetfulness will invite final oblivion is upon us." (1956 Report of Metropolitan Rapid Transit Commission; Stip. 104); "Recent trends towards decay of existing systems, particularly in respect to transportation services crossing the Hudson River, have created a condition of impending emergency. . . ." (Public Law 86-302; 73 Stat. 575 (1959); Stip. 125-26); and "New Jersey has for a considerable period been in the throes of a transportation crisis." (1960 Report of New Jersey State Highway Department, Division of Railroad Transportation; Stip. 133). In 1962 there was a pressing need for rail mass transit, for a variety of reasons. Today there is the same pressing need for rail mass transit for the very same reasons. The only "need" that repeal of the Covenant cures is the need to pass the burden of paying for rail mass transit from the public at large to a certain small segment of the public—those who bought Port Authority bonds.

5. If the Covenant has resulted in "unexpected benefits" they are benefits to the State and not to the Port Authority's bondholders.

This Court in *El Paso* found that the "unforeseen developments" in that case resulted in conferring "considerable advantages on the purchaser" while imposing "a costly and difficult burden on the State," and that the challenged legislation modifying the right to reinstatement merely restricted the parties to those gains reasonably to be expected from the contract. *Id.* at 515.

As a result of the Covenant the State obtained precisely what it bargained for, the take-over, improvement and operation of the bankrupt H & M line by the Port Authority. In return the State surrendered the right to impose any other perpetual deficit rail mass transit projects on the Port Authority without certain restrictions. Based on the passage of the Covenant legislation bondholders invested over one billion dollars in private capital in the Port Authority thus enabling the Authority to finance, *inter alia*, the ever growing deficit of PATH. Bondholders also obtained precisely what they bargained for—protection of pledged revenues and reserves against unlimited involvement in deficit rail mass transit.

6. The Covenant was not merely modified by the challenged legislation; it was totally abrogated.

El Paso is clearly distinguishable from this case because there the agreement made by the State was merely modified in a reasonable way whereas here it was totally abrogated.

Since the Texas statute offered a 5-year grace period from the date of enactment during which a defaulting purchaser, after decades of non-payment, could preserve his interest, the legislative measure was a "mild one indeed". *Id.* at 516. If, however, the right to reinstatement had been cut off upon the enactment of the challenged legislation, this

Court would have been faced with legislation more akin to the 1974 repeal legislation and might well have held such legislation to be unconstitutional.

V.

Chapter 25 of the Laws of New Jersey of 1974 Violates the Fifth and Fourteenth Amendments to the United States Constitution.

The retroactive repeal of the 1962 Covenant also contravenes the Fifth and Fourteenth Amendments to the Federal Constitution.

The superior court did not consider the due process issue on the grounds that (1) it had "factually rejected" the claim that there had been damage to the secondary market for Port Authority bonds and (2) the test of constitutional validity is the same under the Contract and Due Process Clauses.

Rights under a contract have long been deemed to be property entitled to protection under the Due Process clauses. "Valid contracts are property whether the obligor is a private individual, a municipality, a state or the United States." *Lynch* v. *United States,* 292 U.S. 571 (1933); *Wright* v. *Hart,* 182 N.Y. 330, 334 (1905); *see also Tilton* v. *City of Utica,* 60 N.Y.S.2d 249, 263-65 (1946). As discussed above, the 1962 Covenant constituted a contract between the States of New York and New Jersey and with holders of Consolidated Bonds of the Port Authority. This contract was extinguished by the repealing legislation which made no provision for compensating the holders of Consolidated Bonds.

The Due Process and Contract Clauses are often considered together, and several cases and commentators have indicated that the same test is frequently utilized to determine the validity of repealing legislation under the two

Clauses. *Veix* v. *Sixth Ward Building & Loan Association,* 310 U.S. 32 (1940); Hale, *The Supreme Court and the Contract Clause,* 57 Harv. L. Rev., 852, 890, 891 (1944); and Hochmann, *Retroactive Legislation,* 692, 695 (1960). A law, therefore, which unlawfully impairs a contract will also result in a deprivation of property without due process.

The Due Process Clause test has the additional requirement that there must be just compensation for property taken. Justice Black focused on this element of due process in his dissent in *El Paso.* In language which seems particularly fitting for the present case, Justice Black observed:

> ". . . I think the Fifth Amendment [as made applicable to the States by the Fourteenth Amendment] forbids Texas to do so without compensating the holders of contractual rights for the interests it wants to destroy. Contractual rights, this Court has held, are property and the Fifth (through the Fourteenth) Amendment requires that property shall not be taken for public use without just compensation. . . ." 379 U.S. at 533-534.
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> "Our Constitution provides that property needed for public use, whether for schools or highways or any other purpose, shall be paid for out of tax raised funds fairly contributed by all the taxpayers, not just by a few purchasers of land who trusted the State not wisely but too well." *Id.* at 534-35.

It was Justice Black's position that, even if the legislation in question was justifiable by reason of the police power exception to the Contract Clause, it still violated the Due Process Clause because no provision was made for compensating those whose property was taken.

Justice Black's arguments were cited with favor in Note, 51 Virginia Law Review 692 (1965):

> "One need not accept all of the dissent's constitutional absolutism to agree that under the view that the statute actually impaired a vested contract right,

> the decision upholding it on police power grounds seems to carry within it the potential for future encroachments on the just compensation requirement. The power of a state to destroy contracts by statute where it stands to gain direct pecuniary benefit can be questioned seriously on grounds of ethics, policy and precedent." *Id.* at 701-702.

The action of the States resulted in immediate financial loss to the Port Authority's bondholders by reason of the decline in the secondary market for their bonds and the relative lack of marketability of their bonds. The States could have offered to increase the interest on the Consolidated Bonds (as was done for the bondholders of Triborough Bridge and Tunnel Authority at the time that Authority was merged into the Metropolitan Transit Authority in 1968), or offered to refund the bonds or to pledge additional security to insure their repayment. Instead, no compensation was offered to the bondholders, thus depriving them of vested property rights without compensation in violation of the Due Process Clause. *See* Kraft and St. John, *The Contract Clause as the Guardian Against Legislative Impairment of Municipal Bondholders' Rights,* 6 Seton Hall L. Rev. 48, 50 n. 11 (1974); *Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555, 602 (1935).

Conclusion

The decision of the trial court should be reversed and the declaratory judgment sought by the Trust Company should be granted. The 1974 Legislation contravenes the Contract Clause of the United States Constitution and is a taking of bondholders' property without compensation in violation of the Due Process Clause. Chapter 25 of the Laws of New Jersey of 1974 is void.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF FOR APPELLEES

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Dated: September 11, 1976

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

Introductory Statement

This is an appeal from a judgment of the Supreme Court of New Jersey, unanimously affirming a judgment of the Superior Court of New Jersey (Hon. George B. Gelman, J.S.C.), upholding the constitutionality of Chapter 25 of

the Laws of New Jersey, 1974.[1] The challenged 1974 statute, together with concurrent and identical New York legislation, Chapter 993 of the Laws of New York, 1974, repealed 1962 bi-State legislation purporting to limit by covenant the application of the revenues and reserves of the Port Authority of New York and New Jersey for passenger railroad purposes.

The trial court found that, "the claim that bondholder security has been materially impaired or destroyed by the repeal is simply not supported by the record." A 127.[2] The trial court further held that repeal constituted a reasonable exercise of the State's police power. Judgment was entered accordingly, dismissing appellant's complaint and declaring Chapter 25 valid and constitutional. On direct appeal, the Supreme Court of New Jersey unanimously affirmed, "substantially for the reasons set forth in the opinion of Judge Gelman." A 135.

Appellees respectfully submit that the judgments below were correct and should be affirmed.

A. The Early Years: A Port Authority That Was Not Self-Sustaining, the Arrangements That Enabled It to Carry Deficits and the Failure of Legislative Efforts to Have the Authority Assume Responsibility for Passenger Railroads

The Port Authority Compact was enacted by New Jersey and New York and consented to by Congress in 1921. Ch. 151, Laws of N.J., 1921, N.J.S. A. 32:1-1 *et seq.*; Ch. 154,

1. The statute appears at pages 5-6 of Appendix B to the Jurisdictional Statement.

2. "A" refers to the Appendix. "A.B." refers to the brief for appellant. "Stip." refers to the Stipulation among counsel dated December 20, 1974, the entire text of which is contained in Volume IV of the Joint Appendix (cited as "Ja") submitted to the Supreme Court of New Jersey.

Laws of N.Y, 1921, McKinney's Unconsol. Laws §6401 *et seq.*; Pub. Res. 17, 67th Cong., 1st Sess., 42 Stat. 174 (1921). Declaring that "a better coordination of the terminal, transportation and other facilities in, about and through the port of New York, will result in great economies, benefiting the Nation, as well as the States of New York and New Jersey," the Compact created the Port of New York Authority to pursue those elusive goals.[3]

The Compact granted the Port Authority enumerated powers "and such other and additional powers as shall be conferred upon it by the legislature of either State concurred in by the legislature of the other, or by Act or Acts of Congress." Compact Art. III; see also Art. VII. Among the powers enumerated is "full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within the [Port] district." Compact Art. VI. "Transportation facility" is in turn defined to include "railroads . . . for use for the transportation or carriage of persons or property." Compact Art. XXII.

In 1922, the States, again with the consent of Congress, adopted a Comprehensive Plan mainly concerned with railroad freight operations and facilities. A 69. But the Comprehensive Plan was never implemented, in part because of the Port Authority's refusal in 1922 to help solve the problems of railroad passenger traffic. See E. W. Bard, The Port of New York Authority 65-66, 128-130 (1942) (hereinafter cited as Bard).

New Jersey quickly recognized that the Comprehensive Plan was not sufficiently comprehensive: it enacted a law in 1922 finding that the Comprehensive Plan "does not include the problem of passenger traffic in the territory covered by [the] port development plan" even though the

3. The name of the Authority was changed to the Port Authority of New York and New Jersey on July 1, 1972. N.J.S.A. 32:1-4.

"problem of passenger traffic should be considered in co-operation with the port development commission." A 569.[4]

The Port Authority also recognized that freight and passenger service were not two problems but inseparable parts of a single problem. Its 1924 Annual Report observed:

> "There is barely room during the rush hours for the trains carrying freight because of the commuter service, while passengers and freight must both necessarily move during these hours." A 156.

The point was repeated in the Port Authority's 1928 Annual Report:

> "The Commissioners of the Port Authority have found in their studies that no adequate or effective interstate transportation development can take place without taking full account of transportation of passengers as well as of freight throughout the Port District." A 151, 575.

The Legislatures of both States agreed. In 1927, the New Jersey Legislature, stating that it was acting "under and pursuant to the provisions of the [Port Authority] compact," directed the Port Authority "to make such plans for the development of said district supplementary to or amendatory of the comprehensive plan heretofore adopted by the Legislatures of the two States . . . as will provide adequate interstate and suburban transportation facilities for passengers. . . ." A 57.[5] This legislation, which became

4. The legislation established a study commission that worked with the Port Authority in establishing a new agency, of which the Authority was a member, to coordinate solutions to the problems of commuter transportation. A 576.

5. In light of this early history, appellant obviously errs at the very outset of its discussion of "Port Authority Involvement in Mass Transit," A.B. 8, when it says: "As early as 1922, the legislatures recognized that the Port Authority was not the appropriate agency to develop a solution to the problems of railroad passenger traffic." *Id.*

Chapter 277 of the Laws of New Jersey, 1927, was signed by Governor Moore and approved the following year by the New York Legislature, but was vetoed by Governor Alfred E. Smith. A 572-574.[6] As the trial court found, Governor Smith's veto ended the Port Authority's active involvement in any solution of commuter transit problems for the next 30 years. A 80.

The Port Authority took a new tack and began its construction program by building four bridges for motor vehicles. A 71. These bridges, which still account for much of the Port Authority's financial strength, see A 737, were made possible by advances from the States to pay 25 percent of the costs of construction. The advances took the form of loans subordinated to the bonds the Authority sold to the public. A 71. A separate series of bonds was issued for each bridge and the bondholders' security was limited to the revenue from that bridge. A 71. In their early years, however, the bridges did not meet revenue expectations and the Authority was not only not self-supporting, but faced default on its bonds. A 70 n. 8, 72, 820.

The Legislatures' response to the Port Authority's predicament was two-fold. First, they transferred the control, operation and revenues of the highly successful Holland Tunnel to the Authority: its annual surpluses after debt service were large enough to cover the bridge deficits. BARD at 238; A 70 n. 8. Second, the States enacted statutes creating the General Reserve Fund, in which surplus revenues from all Authority facilities are pooled to create a bondholders reserve fund in an amount equal to 10 percent

6. Appellant says, A.B. 8, that Governor Smith vetoed the bi-State legislation "on the ground that the Port Authority was never intended to become involved in rail mass transit." The veto message, A 572-574, contains no such statement and bases the veto on Governor Smith's unwillingness to divert the Authority from the solution of the freight distribution problem. The Port Authority Commissioners responded that the feared diversion of efforts would not take place, A 151 n. 9, demonstrating that they too understood this to be the basis of the veto.

of the par value of the Authority's outstanding bonds. A 72. The General Reserve Fund, which contained $173,487,000 when the 1962 covenant was repealed, A 817, is irrevocably pledged as security for the Port Authority's bonds. A 72, 791-795.[7]

The General Solicitor of the Port Authority, Daniel B. Goldberg, characterized the General Reserve Fund as "the absolute foundation of the Port Authority's whole financial structure." A 821. In addition to offering an attractive inducement and security to investors, the General Reserve Fund, by eliminating the prior separation between facilities, permitted the Authority "to meet the requirements of any financially weak facility which had not yet reached its stride or which for any other reason could not at a particular point of time carry its own load."

Appellant claims, A.B. 5-6, that "The superior court outlined the basic financing principles which have guided the Port Authority for over fifty years" and included among these principles the requirement that "the specific projects undertaken by the Authority should be self-supporting, *i.e.*, the revenues of each should be sufficient to cover its operating expenses and debt service requirements. . . ."

7. The creation of the General Reserve Fund made the Port Authority's fiscal strength possible. It also made it possible for the Authority to insulate surplus revenues from public control.

The General Reserve Fund statutes, enacted in 1931, provided that any surplus revenues not needed to maintain the Fund in its prescribed statutory amount, 10 percent of the par value of the Authority's outstanding bonds, "shall be used for such purposes as may hereafter be directed by" the States. N.J.S.A. 32:1-142. In 1935, however, the Authority adopted a bond resolution providing that only 50 percent of its surplus revenues could be used for "any purpose permitted by law." BARD at 256; A 827.

The General Reserve Fund reached the prescribed level in 1946. A 826. In 1947, the Authority announced that as a matter of policy it would attempt to retain in all of its reserve funds an amount equal to at least the next two years' debt service on its bonds. A 829-831.

Finally, in 1952 the Authority adopted its Consolidated Bond Resolution and Series Resolutions. These resolutions prohibited the Authority from using any of its reserve funds unless such use was "to or for the benefit of" bondholders.

Appellant is wrong. In 1924, the Port Authority's Annual Report said that "it should not be expected to be self-supporting." A 159. By 1931, it faced default on its bonds because its individual facilities were not self-supporting. After the 1931 pooling legislation, there was no requirement that individual facilities be self-supporting so long as the Authority as a whole was in the black. Though the self-supporting facility concept may have "initially emerged," as the trial court actually said, A.B. 6, A 71, the concept had no practical significance because it was not attained prior to 1931 and was unnecessary after 1931. As Dr. Bard wrote in 1942:

> "The 1931 legislation changed the formula from simply self-sustaining to self-sustaining as a group. The device of grouping facilities and pooling revenues shifted the basis of credit from a judgment as to the capacity of a new project to be self-sustaining to a judgment as to the future of existing revenues affected as they might be by the new project." BARD at 325.

See also *id.* at 265 (the General Reserve Fund "had the effect of eliminating the individual facility as a basis for credit, and shifted that basis to the group as a whole").

Appellant's claim that the Port Authority has always been guided by the principle that each facility must be self-supporting is also refuted by the Consolidated Bond Resolution. The trial court found that with the adoption of that resolution in 1952, the self-supporting facility concept "ceased to have the significance previously attached to it." A 74. He further found: "While some facilities may not yield sufficient revenues to pay operating expenses and/or debt service requirements, what is of paramount concern to bondholders under the CBR is whether the total revenues of the Authority are sufficient to satisfy all of its obligations to bondholders." *Id.* Indeed, the independent

auditors retained by the Farley Committee in 1960 specifically reported that "few of [the Authority's] facilities would have financially feasible without the ability to pool revenues of all facilities." A650.

B. The Port Authority Seeks Immunity From the "Disease" of Commuter Railroads[8]

1. *The Metropolitan Rapid Transit Commission study*

The years following the creation of the General Reserve Fund were filled with studies and reports decrying the deteriorating condition of rail mass transit. See A 80-81; Stip., pp. 83-97. In 1954, the States established the Metropolitan Rapid Transit Commission to study the problem. Stip., p. 99. In 1955, the MRTC issued an interim report observing that, since 1930, billions of public dollars had been spent on the development of tax-exempt or subsidized vehicular highways and bridges, but no public funds had been spent on rail mass transit between New York and New Jersey. The report concluded that the proposal of the Port Authority and the Triborough Bridge and Tunnel Authority to spend $577,000,000 on new and expanded vehicular bridges "raises the fundamental question of public policy whether any further crossings of the Hudson River should be constructed until it is determined whether future crossings should be designed to encourage rail or vehicular traffic." Stip., pp. 100-101.

By this time, the Port Authority had come to a marked preference for rubber over rail, see, *e.g.*, Stip., Exhibit VII at Volume VI of the Joint Appendix below, pp. 121A-138A. Accordingly, when the MRTC ran out of funds to continue its work, the Authority agreed to finance a comprehensive study of the interstate rail problems on the basis of a

8. The characterization is that of Daniel B. Goldberg, General Solicitor of the Port Authority. A 839.

"Memorandum of Understanding" between the Authority and the MRTC stating that the Authority was able to undertake facilities "only if competent estimates indicate that in the long run they will be self-liquidating in and of themselves" and that the maintenance and improvement of metropolitan rail transit systems "could not be economically self-supporting." Stip., p. 102. See also A 161-162. In other words, using the false premise that the Authority could only undertake projects that were in and of themselves self-supporting, the Authority agreed to finance the MRTC study of the problem on condition that it would not be part of the solution. In 1958, the MRTC issued its report commenting at length upon the "constant and relentless deterioration of suburban rail service," which it characterized as a "looming crisis." A 82. True to the Memorandum of Understanding, the MRTC said that improved rail mass transit "financing would not be available from any of the existing public authorities." *Id.*

Nevertheless, during the 1958 session of the New Jersey Legislature, a bill was introduced (Assembly Bill No. 16) that would have required the Port Authority to take over, improve and operate interstate rail mass transit between New Jersey and New York. A 82-83. The Authority responded with a new bond provision to make sure that it would not be "open to this kind of a financial raid," A 838, and it marshalled a powerful political offensive. Each is discussed in detail below.

2. *The new bond provision—Section 7 certification*

When the New Jersey Assembly began considering Assembly Bill No. 16, the Port Authority began including a new safeguard in its contracts with bondholders. Since 1958, Section 7 of the resolution that authorizes each series of bonds (hereinafter "the Series Resolutions") has prohibited the issuance of any bonds secured by the General

Reserve Fund for any facility not previously financed by bonds secured by the General Reserve Fund (such as a rail mass transit facility), unless the Port Authority first certifies that the issuance of those bonds would not materially impair the sound credit standing of the Authority, the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments, including its undertakings to the holders of Consolidated Bonds. A 78, 811-812. In 1961, Mr. Goldberg explained that the Section 7 certification was adopted to make it absolutely clear that "deficit-ridden railroads" could not be brought into the General Reserve Fund family. A 839-80.[9]

3. *The New York commuter car episode*

Since the Port Authority's resistance to efforts to involve it in commuter car financing appears to have served as a model for the Hudson and Manhattan struggle, and since appellant claims at A.B. 14, 73 that, in preference to repeal, the States should adopt this method of financing rail mass transit improvements, it deserves far closer examination than is provided in the anticipatory footnote 8 at A.B. 10.

In February 1959, Robert W. Purcell, a transportation adviser to Governor Rockefeller, raised the possibility of the Port Authority's issuing bonds to finance passenger equipment purchases for the Long Island and New York Central Roalroads. The idea called for the Authority to be reimbursed in full, including interest costs, via rental payments to be made by the railroads. A 313-314. As originally proposed by Mr. Purcell, the States would not have guaranteed payment of the bonds.

R. M. Schmidt, a vice president of Blyth & Co. and head of its municipal finance department, A 307, advised Mr. Purcell that his idea seemed "ingenious and something worthwhile exploring." A 313.

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9. Each Series Resolution declares that it "shall constitute a contract with" bondholders. Stip., Ex. II, Section 2, at 72, in Volume V of the Joint Appendix below.

Two days later, Port Authority Executive Director Austin Tobin began to organize "bondholder concern" in opposition to the plan. Mr. Schmidt described the Port Authority pressures in detail:

> "the Authority on Friday, February 27th, called our office and asked us to meet with them at the First National City Bank on Monday, March 1st. George LeVind and Fred Miller attended that meeting. Also, the managers of the syndicates that usually bid for their bonds at public sale, namely Harriman Ripley & Co. (our joint account partners) and Halsey, Stuart, Glore Forgan and Drexel who are joint managers of the competing syndicate. They presented a strong story disapproving the plan and the adverse effect on their credit and market for their bonds, also submitted a suggested letter for the managers to sign. LeVind, Miller and Hawes discussed their request and also talked with me at home. We all agreed not to sign the letter or send any letter.
>
> "Following this, Gene Mintkeski (Port of N. Y. Auth.) called me at home and talked with me for about 15 minutes. He apparently was very much disturbed over the fact that we would not sign such a letter and that I had told Mr. Purcell I thought his idea was ingenious, worth studying and exploring. I stated that at no time did I give approval or disapproval to Mr. Purcell's idea. We felt very strongly that we should have in greater detail Mr. Purcell's plan and at least give him an equal chance to present an answer to the position that the Port of New York Authority is taking.
>
> "On Tuesday, March 3rd, at 1 P.M. Joe Ripley of Harriman Ripley telephoned and asked me to go over there for lunch to discuss this Port of New York Authority problem. He had with him Elwood Smith, Stu Silloway and Berry. He stated the luncheon was prompted by Mr. Cullman coming to see him and considerably upset because he had heard that I had given approval to Mr. Purcell's plan and wanted to know whether or not I had.

"The foregoing memorandum answers that. I told him specifically I had not given my approval but in response to a call to us I gave Mr. Purcell the courteous consideration that he was entitled to and reviewed the whole story as written above. They had no criticism of my action. In fact, Joe Ripley thought he would have acted in the same manner I had if he had had a call from a representative of Governor Rockefeller.

"I reported all this to Messrs. Hawes and Miller and also in compliance with a request from Mr. Cullman (which was arranged by Mr. Ripley) I then called Austin Tobin. The conversation was very unpleasant. He, in fact, requested—if not demanded—that we write a letter disapproving the Purcell plan which I told him we would not do and I took exception that they quoted me out of context in their letter of March 2, which he denied. The conversation was very acrimonious and I would say that Mr. Tobin was rude, officious and impertinent and I ended by telling him so.

R. M. Schmidt"

A 313-315.

Mr. Cullman was Honorary Chairman and a Commissioner of the Port Authority at the time and he seconded Mr. Tobin's efforts with vigor. See, for example, A 316, a March 5, 1959 message from Mr. Cullman to Mr. Ripley:

> "Governor Rockefeller was informed that issuing equipment trust to the railroads would not hurt Port Authority credit, and that all the investment bankers were unanimous that that was so. And, therefore, Mr. Cullman feels that it is very important that Mr. Ripley send him the letter he requested."

Mr. Ripley sent the requested letter and Mr. Tobin reported to Mr. Ripley by letter dated March 17, 1959:

> "the proposal for Port Authority participation on the basis of what was called 'equipment trust financing' or, for that matter, suggestions for any financial assistance by the Port Authority in the field of commuter rapid transit were dropped. We were then able to come to this combination of state advances and bonds guaranteed by the state, with the Port Authority simply carrying out the administrative and managerial work of the state's participation." A 333-334.

Testifying about the matter in 1960, Mr. Tobin acknowledged that the Port Authority had "appealed" to the investment bankers to oppose the Purcell plan. A 303. He added: "So that such meetings as you describe were held, *and would be held again in similar circumstances.*" A 304; emphasis added.

Mr. Tobin did call such a meeting in July 1960, to "appeal to the investment bankers" for assistance against a House Judiciary Subcommittee investigation of the Port Authority. He characterized the Subcommittee's investigation of his agency "a grievious threat to State and municipal financing." A 340-342. And once again the concern of the investment community was expressed. A 343-344.

4. *Opposing New Jersey legislation in 1958*

Mr. Tobin had in fact turned out the troops even before the Purcell episode. As mentioned above, at the 1958 session of the New Jersey Legislature, Assembly Bill No. 16 had been introduced: it would have required the Port Authority to assume responsibility for commuter railroads between New Jersey and New York. A 82-83. The Port Authority expressed a view strongly opposing the legislation and, as the trial court found, "To reinforce this view the Authority solicited and included in its statement similar expressions of opinion from members of the invest-

ment banking community." A 83. Having solicited opposing statements, the Port Authority duly reported that its opposition "is supported by views expressed by other responsible persons in the investment and banking field, who as a practical matter, are the controlling influence upon the receptivity of bondholders to Port Authority investment." A 589.

The "other responsible persons in the investment and banking field" were the same small group to whom Mr. Tobin appealed for help against Mr. Purcell. In fact, the Port Authority statement mentions only two by name—E. B. Rockwell of Halsey, Stuart and Company and Reginald M. Schmidt of Blyth and Company. A 589-590. Mr. Schmidt was obviously concerned about the specific proposal contained in Assembly Bill No. 16, A 590, but was not categorically opposed to Port Authority involvment in mass transit. Indeed, he would later charge Mr. Tobin with quoting him out of context. A 315, quoted at page 12, *supra*. Mr. Rockwell, on the other hand, parroted the Port Authority's categorical position. The Authority opposed Assembly No. 16 "or *any other legislation* which would attempt to involve the Port Authority *in any way* in responsibility for rapid transit." A 586; emphasis added. Mr. Rockwell of Halsey, Stuart did likewise:

> "In our opinion *any assumption of responsibility* on your part for rail rapid transit in the New York area would, *on almost any conceivable terms*, be harmful to the present investment standing of the Port bonds and would adversely affect the ability of the Port Authority to finance in the future on terms as favorable as hitherto. In our opinion, it is most essential for the preservation of The Port of New York Authority to be *completely free of any responsibility whatsoever for rail rapid transit in this area.*" A 589-590; emphasis added.

C. Legislative History of the 1962 Covenant

Until 1962, the leadership of the Port Authority had resolutely, and successfully, opposed meaningful Port Authority participation in the carriage of persons by rail. General Solicitor Goldberg called it "a disease," A 839, and the Authority's Executive Director, Austin Tobin, was a vigorous practitioner of preventive medicine. On any proposal having to do with mass transit, Mr. Tobin would go to his underwriters and ask them to express concern for the Port Authority's credit, whether they felt it or not. He would then report to the Legislature, or the Governor, that they must bow to these "responsible investment banking leaders. For all practical purposes they are the controlling influences of our credit." A 592.

And so it was with the covenant. It was unquestionably the Port Authority's idea. See, *e.g.*, A 95-96, 183, 841. These unambiguous record references plainly show that there is no basis for appellant's repeated and wholly unsupported characterization, A.B. 27-28, 77, of the covenant as something "for which they [bondholders] had bargained." And the Authority imposed it on the Farley Committee on the usual ground—the Authority could not sell bonds without it. See, for example, the extraordinary claim of Authority Commissioner Kellogg:

> "Applied to the H&M proposal, I would like to make it clear that the question of whether or not we can borrow the $83,500,000 which is required, is not simply a question of whether or not we would have to pay a higher rate of interest on these funds. We can only submit to you the unanimous view of the Commissioners of the Port Authority that there is no possibility whatsoever of borrowing the money at all without a statutory assurance to investors that any future Port Authority responsibilites in the field of commuter rail transport over and above the present and existing interstate Hudson and Manhat-

tan railroad system will not involve a pledge of the Port Authority's General Reserve Fund." A 87, 632-633.

Even appellant's chief witness in this proceeding never claimed that the Authority could not sell bonds without the covenant. Mr. Thompson opined only that, "All other things remaining equal and the authorization for the PATH takeover and the World Trade Center without the covenant would have resulted in my opinion in a less favorable market for the Port Authority bonds and a higher interest for the Port Authority bonds." A 859. "All other things remaining equal" would, of course, include Mr. Tobin's saying that without the covenant the Port Authority's credit would be ruined, and this element of the hypothesis was expressly called to Mr. Thompson's attention. A 858. Similarly, appellant's sole investor witness testified, "I can't say for certain we would not have purchased" Port Authority bonds without the covenant. A 1105.

It is also worth noting that the Commissioners who were unanimously of the view "that there is no possibility whatsoever of borrowing the money at all" without the covenant were the same Commissioners who, two years earlier, had been unanimously opposed to any legislation "which would attempt to involve the Port Authority in any way in responsibility for rapid transit." A 586. Yet, in the intervening two years, the lack of any foundation for the Commissioners' earlier claims had become apparent to all. A 1959 Joint Assembly Committee report on Assembly Bill No. 16 had concluded that the Authority should assume some rail mass transit deficits. A 83-84, 593-597.[10] See

10. Appellant erroneously characterizes this report as concluding that the Authority "should only become involved in self-supporting facilities. (A 593-597)." A.B. 10 n. 7. In fact, the legislative report understood and referred to the pooling concept and said that the Authority "no doubt could undertake an activity which would involve a deficit—even a permanent one." A 594.

also A 162. And in April 1960, the New Jersey Highway Department issued a report that concluded, A 608:

> "The Port of New York Authority should not, in our opinion, be handed New Jersey's rail problem, nor should it become responsible for the New York subway system or for rail transportation for Westchester or Long Island. We are certain however, that the interstate aspects of the rail movement of persons and goods such as purchase and lease of new Hudson and Manhattan commuter cars and the purchase of the existing interstate railroad ferry boats, do come within their obligations. The foregoing fully recognizes the importance of maintaining the Port of New York Authority's commitments and credit requirements."

The Port Authority beat a strategic retreat: it would take over the crumbling but vital Hudson & Manhattan Railroad on condition that the Legislatures give it the 1962 covenant.[11] Unable to claim any longer that any involvement whatsoever of the Port Authority in rail mass transit would destroy its credit, unable to claim even that acquisition of the Hudson and Manhattan would impair bondholder security, the Port Authority claimed that *any future involvement whatsoever* would make its bonds unsalable. And the Legislatures, anxious for progress on the Hudson and Manhattan, accepted Mr. Tobin's terms, see A 612, 642, after Senator Farley expressed his opinion that "one Legislature cannot bind a subsequent Legislature involving policy." A 87-90, 635-639.

11. The 1962 legislation contains detailed findings about the importance of rail mass transit, the plight of the Hudson & Manhattan Railroad and the need for its acquisition by the Port Authority, but none about the need for the 1962 covenant. See N.J.S.A. 32:1-35.50. Yet appellant complains about the absence of specific legislative findings supporting repeal of the covenant. See A.B. 26, 56.

D. The 1962 Covenant

The 1962 covenant was a part of the bi-State legislation authorizing the Port Authority to acquire, construct and operate the Hudson & Manhattan Railroad and the World Trade Center. A 90-91, 672-673. In revelant part, the statute says, N.J.S.A. 32:1-35.55, A 92:

> "The 2 States covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, . . . (b) neither the States nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth."

"Permitted purposes" were defined by the statute to include: (i) the Hudson Tubes as it existed on the effective date of the legislation, (ii) railroad freight facilities, (iii) railroad tracks and related facilities on vehicular bridges owned by the Port Authority, and (iv) a passenger railroad facility, if the Port Authority first certified either that the facility is "self-supporting" or, if not, that at the end of the preceding calendar year the General Reserve Fund contained the prescribed statutory amount and that all of the Authority's passenger railroads, including the Hudson & Manhattan, will not produce deficits in excess of "permitted deficits."

With respect to permitted purpose (iv), a passenger railroad facility would be deemed to be "self-supporting" if the

"amount estimated by the port authority for the ensuing 10 years to be the average annual net income (computed without deduction of debt service) derived from or incidental to such facility equals or exceeds the amount estimated by the port authority for such 10 years to be the average annual debt service upon bonds for purposes in connection with such proposed facility."

Though the covenant is not explicit on the point, both States, the Port Authority and its bond counsel have all agreed that State subsidies may be included in the computation of "average annual net income . . . derived from or incidental to such facility." Stip., p. 239 and Ex. VIII in Volume VI of the Joint Appendix below. Thus, a passenger railroad would be self-supporting if, "for the ensuing 10 years," the Port Authority's estimate of net operating revenues and State support equalled its estimate of debt service "upon bonds for purposes in connection with such proposed facility."

"Permitted deficits," the alternative method to satisfying permitted purpose (iv) for a new passenger railroad, were defined to mean that the annual estimated deficit (after including estimated debt service) of both the Hudson Tubes and any additional non-"self-supporting" passenger railroad facility could not exceed one-tenth of the General Reserve Fund (or one percent of the Authority's total bonded debt). Here too State subsidies are at least theoretically possible, though on more difficult terms than under the "self-supporting" rubric. The parties stipulated, A 692, and the trial court found, A 94n. 26, that the annual deficits of the Hudson Tubes exceed the "permitted deficits" and the covenant therefore prohibits the Authority from issuing bonds secured by its reserve funds for any new deficit passenger rail facility.

E. The Unimportance of the 1962 Covenant to Bondholder Security

In reality, and as Dr. Bard found back in 1942 and the Assembly Committees reported in 1959, bondholders needed assurance that the Port Authority would not be so burdened with deficits that its profitable facilities might have difficulty carrying them.[12] But the provisions of the Consolidated Bond Resolution and the Series Resolutions fully protected them against that possibility, as will appear presently. The covenant was necessary to protect not the bondholders' security but Mr. Tobin's conception of the Port Authority as a master builder of bridges, tunnels, airports and, ultimately, the $1 billion World Trade Center. Years later, in explaining why bondholders had nothing to fear if the covenant were eliminated, Moody's would make the point: "demands for mass transportation would probably obstruct further Authority expansion into other fields. Bondholder protection would remain adequate. . . ." A 750-751.

Similarly, in a report issued just two weeks after the trial court's decision sustaining repeal, Barr Brothers, from whom appellant selected one of its four witnesses, stated unequivocally: "Whether or not the Port Authority ever gets involved in Mass Transit, we feel it continues to be one of the finest revenue credits in the country, amply protected by the basic bond resolution. . . ." A 423. In sum, the trial court correctly concluded that:

> "The claim that bondholder security has been materially impaired or destroyed by the repeal is simply not supported by the record." A 27.

Nothing in appellant's brief detracts in the slightest from the validity of this fundamental conclusion that, in and of itself, requires affirmance of the judgment below.

12. Mr. Murphy of Barr Brothers, appellant's witness, likewise emphasized the importance of the "bottom line." A 991.

1. *Bondholders are fully protected*

a. *The objective protections.* General Solicitor Goldberg's compendious view of the effect of the many bondholder protections is helpful. Speaking to the Executive Staff of the Authority in October 1961, *before the enactment of the covenant,* Mr. Goldberg emphasized that Port Authority revenues could not be used to "subsidize the private railroads to the extent of their commuter operating deficits." A 839. Mr. Zarin, the Port Authority's Chief of the Finance Division of the Law Department, A 1004, concurred in that view at trial. A 1047-1050. In other words, the covenant was redundant in so far as it purported to prevent the Port Authority from giving its revenues to others for the benefit of railroads, and appellant does not contend otherwise.

Mr. Goldberg continued:

> "However there still was a fear in the financial community that the Port Authority might somehow take *into* its General Reserve Fund family a group of deficit-ridden railroads and then, by having gotten the disease into our own financial body, be in a position legally to apply our monies to their operating and debt service deficits. The fear was that in some such way we might actually dilute our earning and reserve position to a point where we would no longer have the financial capacity to meet the requirements of the existing bonds and of any other bonds we might have to put out for our self-supporting projects.
>
> "We in the Law Department have always held the firm opinion that the Port Authority *lacks* the power so to dilute the security of its bondholders, and we have advised the Commissioners to that effect. . . ." A 839.

Notwithstanding this legal opinion, Mr. Goldberg said, the Authority added the certification requirement to Section 7 of its Series Resolutions to make it absolutely clear that its bondholders' security could not be impaired by the acquisition of "deficit-ridden railroads." A 839-840. It will

be recalled that Section 7, see pages 9-10, *supra,* places the Port Authority under a contractual duty not to issue Consolidated Bonds for an additional facility unless it can certify compliance with three conditions: that the issuance of the bonds will not "materially impair the sound credit standing of the Authority"; that issuance will not materially impair "the investment status of Consolidated Bonds"; and that issuance will not materially impair "the ability of the Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds." All three conditions must be met. A 1053.

Thus, before the covenant was enacted, the Port Authority could not give its revenues or reserves to others to subsidize mass transit and it could not itself undertake any mass transit projects that might endanger the bondholders' security. Mr. Goldberg was unequivocal on the point; the trial court agreed, A 127-128; and the complex web of bondholder protections that existed in 1961 fully supports their conclusion.

The main strands in that web are the General Reserve Fund, the Consolidated Bond Resolution of 1952, and the Series Resolutions. They combine to dedicate all revenues and reserves of the Port Authority for the benefit of bondholders. Hence Mr. Goldberg's undisputed conclusion that the Authority cannot give its resources away.[13] The Au-

13. The General Reserve Fund may only be used for "purposes in connection with bonds secured by a pledge of the General Reserve Fund . . . ." A 287. The Consolidated Bond Resolution pledges the net revenues from each facility financed by the issuance of Consolidated Bonds to the payment of debt service on all Consolidated Bonds. A 789-791. It creates the Consolidated Bond Reserve Fund, which it likewise pledges as security for Consolidated Bonds. A 795-797. The first paragraph of Section 7 of the Series Resolution, A 810-811, prevents the application of any part of this fund for the payment of operating deficits of a facility acquired without the issuance of Consolidated Bonds. See also A 1050. In 1962, there was nothing in the Consolidated Bond Reserve Fund. It began to grow in the years immediately preceding repeal, increasing from $7.1 million in 1972 to $21.9 million in 1973 and $46.8 million in 1974. A 500, 518. Total Port Authority reserves exceeded one-quarter of a billion dollars at the end of 1974. *Id.*

thority can apply its revenues or reserves to pay the deficits of a railroad only if it first issues bonds secured by the General Reserve Fund to finance that railroad. And the Authority can only do that if it meets the requirements of the Section 7 certification.

Even then, the Authority still could not issue a Consolidated Bond without also meeting the 1.3 test of the Consolidated Bond Resolution. A 75-76, 784-788. In 1961, Mr. Goldberg described the purpose and operation of the 1.3 this way:

> "And so he [the bondholder] must be sure that the Port Authority is not able to dilute the net revenue potential of the facilities to a point where the money that is going to come in—this gross revenue box that we start off with at the head of each column in the revenue flow chart—is going to get too small for the O&M and the debt service that it has to cover. He wants to be sure that we don't balloon the amount of our bonds up so big and get our debt service up so big and, in the case of a facility which wouldn't be carrying itself, like a Hudson & Manhattan Railroad, even get its operation and maintenance expenses up so big, that there wouldn't be enough overall to meet the debt service on his bonds and on the new bonds that might be put out in connection with new facilities.
>
> "Now the mechanism by which this insurance was given was the 1.3 earnings test. All this test is is a requirement that the Port Authority will not issue new Consolidated Bonds unless it can show, at each point of time it proposes to issue new consolidated bonds, that certain earnings equal 130 per cent of, or 1.3 times certain debt service on certain bonds. For the most part, the earnings that are used in this equation are historical earnings. They are the best twelve months out of the previous thirty-six months and in practice these have always been the last year, which has always been our best year. In certain limited instances we can augment these historical earnings with some estimates, but for the most part you

can think of the earnings that we have to use in this test as historical earnings.

"On the other side of the equation is the debt service—that is the interest, the amortization on the bonds, the annual maturities, the sinking fund requirements—which we must cover 1.3 times out of these earnings. This debt service is the requirement for that year in the future when our scheduled debt service will be at a maximum. In other words, we must take our peak demand year in the future for combined debt service on already-issued bonds and the proposed new bonds. We know our scheduled sinking fund and principal maturities; we know our scheduled interest requirements. We look up the schedule to figure out in which year in the future our scheduled debt service will be the heaviest, and then we compare this with our historical earnings, and if we can't show that the maximum future year's debt service requirements have been met historically in one of the past three years 1.3 times, we can't issue a Consolidated Bond." A 833-834.

When a deficit facility is acquired or built its losses are counted in determining whether the revenues from all of the Authority's facilities equal or exceed 1.3 times maximum future debt service. A 76. Similarly, debt service attributable to the new facility must be taken into account. In other words, the deficit must be subtracted from the revenue side of the equation and the new debt service must be added to the debt service side of the equation. As a result, no deficit facility can be brought into the Consolidated Bond "family" unless there is a healthy margin of net revenues from all Port Authority facilities in excess of actual debt service.

Other bondholder protections to be found in the Consolidated Bond Resolution but not in appellant's brief

include the Authority's obligation under Section 12(f), A 799:

> "To establish and collect flight fees, wharfage, dockage, rents, tolls and other charges in connection with facilities the net revenues of which are pledged as security for Consolidated Bonds, to the end that at least sufficient net revenues may be produced therefrom at all times to provide for the debt service upon all Consolidated Bonds."

To paraphrase Section 12(f) of the Consolidated Bond Resolution, the Authority is contractually obliged to run in the black. To take over or build a facility that would impose deficits so large that increases in tolls and charges could not carry them would violate Section 12(f) as well as the various provisions discussed above.[14]

The 1962 covenant added nothing to these protections. As the foregoing discussion makes clear, the Port Authority is contractually obliged to maintain reserves for the protection of bondholders, to have a healthy margin of revenues over debt service before issuing bonds and to refrain from issuing bonds to build or acquire a new facility if to do so will materially impair the Authority's credit standing, the investment status of its bonds or its ability to fulfill its commitments. These provisions make it impossible for the Authority to take over a passenger railroad that would jeopardize the security of bondholders.

To be sure, the covenant did constitute a significant impediment to Port Authority involvement in rail mass transit, but, viewed objectively, it added to the impediments

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14. Other bondholder protections found in the Series Resolutions include provision for sinking fund payments and schedules of mandatory periodic retirement of bonds. Stip., Ex. II, pp. 74-75 in Volume V of the Joint Appendix below.

posed by the pre-existing protections only by blocking rail mass transit that does not threaten bondholder security.[15]

b. *Appellant's analysis of the objective protections.* Appellant attacks the importance of the 1.3 test by suggesting, first, that the test would not apply if the Authority issued bonds other than Consolidated Bonds, A.B. 30 & n.18, and, second, that the test does not consider prospective operating deficits of a new facility, A.B. 30-31 and 33 n.20. Both arguments are untenable.

If the non-Consolidated Bonds are secured by a pledge of the General Reserve Fund,[16] and are issued to acquire a new facility, the Section 7 certification would still have to be made. Moreover, no non-Consolidated Bond secured by

15. The 1962 Legislature was not advised of this conclusion to which Mr. Goldberg's analysis the year before inexorably led. See A 838-840. No Authority spokesman attempted to explain the objective importance of the covenant, *i.e.*, what it added to existing safeguards. On the contrary, the Authority simply stated, A 86, that it would not certify the H & M Railroad under Section 7 unless the covenant was enacted and claimed, A 87, that it could sell no bonds without the covenant.

The Farley Committee's 1963 report concluded accordingly:

> "This Committee was convinced that the *credit problem which had been pointed out by the Port of New York Authority* was a valid and real one and that the Port Authority could not assume *responsibility for the complete burden of the deficit-ridden commuter railroad problem* in the area of northern New Jersey and New York. If the Port Authority were to receive *such unrestricted responsibility,* there is no question but that its sound credit position would be seriously impaired, if not destroyed . . . ." A 655; emphasis added.

The Farley Committee was not advised of the many existing protections against assumption of "the complete burden" or "unrestricted responsibility" for commuter rail deficits. Thus, the Farley Committee supported the covenant, unaware that the risks the covenant was supposed to avoid were already blocked.

16. If the non-Consolidated Bonds are not secured by a pledge of the General Reserve Fund, none of the revenues or reserves of the Authority's present facilities could be used to pay those bonds or to support the facility financed by them. Such bonds would have no effect on current bondholders.

a pledge of the General Reserve Fund has been offered since the Authority began issuing Consolidated Bonds in 1952 and, as appellant says, A.B. 30 n.18, the Authority has stated its intention to issue only Consolidated Bonds. Finally, Sections 4 and 5 of the Consolidated Bond Resolution pledge the net revenues of all of the Authority's facilities to the payment of debt service upon Consolidated Bonds. A 789-791. As a result, no revenues from the Authority's existing facilities would be available for payment of debt service on non-Consolidated Bonds until the debt service on Consolidated Bonds was paid. Consequently, non-Consolidated Bonds would be marketable only if purchasers were confident that the Port Authority would continue to generate revenues well above all operating expenses and debt service—*i.e.*, something akin to the 1.3 test. These points were recognized by Mr. Goldberg in 1961:

> "[T]he things the States direct the Port Authority to do these days are not capable of immediate self-support. So we are practically restricted to Consolidated Bonds and the 1.3 test." A 834.

Appellant's suggestions, A.B. 30-31 and 33 n.20, that the 1.3 test may not protect against operating deficits of a new facility fail to mention that the trial court specifically held that "the estimated average annual *deficits* of a new facility must be charged against historical revenues in determining whether the 1.3 test has been met." A 76; emphasis in original.[17] But even if appellant were right and the Port Authority Commissioners could somehow escape counting the deficits of a new facility at the time they begin to build

17. Judge Gelman's analysis was clearly correct, for as Vice Chairman Kellogg told the Farley Committee, the 1.3 test precludes the issuance of Consolidated Bonds "for any facility unless it can be demonstrated that, *including the new facility,* net revenues will be sufficient to cover by at least 1.3 times the maximum interest and principal payments due in any future year." A 87.

it, after it goes into operation its deficits will be counted in future applications of the 1.3 test. As Mr. Goldberg put it,

> "At the point where we can only show barely 1.3 or a whisker under 1.3, we can't put out Consolidated Bonds. The 1.3 status is not prosperity to us; it is practically the point of enforced stagnation. It is the point at which our ability to finance any future projects, even any capital improvements to existing facilities, ceases. For the Port Authority to continue as a healthy, vigorous organization, doing the job it was set up to do and which it has done so well in the past, we must keep our coverage up as high as we can." A 836.

Since the building of a facility that would generate deficits large enough to cause future difficulty with the 1.3 test would bring the Port Authority to "the point of enforced stagnation," end its "ability to finance any future projects," and endanger the Port Authority "as a healthy, vigorous organization," the building of such a facility would obviously run afoul of the Section 7 certification requirements. The Authority could not, consistent with its contractual commitment to bondholders, certify that the issuance of bonds for such a facility would not "materially impair the sound credit standing of the Authority or the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments."[18]

18. In its reply to our motion to dismiss, appellant claimed in its footnote at page 3 that according to the Port Authority's financial expert, Mr. Zarin, "*only* the 1962 covenant would prevent a Port Authority takeover of the Second Avenue subway line." But Mr. Zarin's testimony on this point was limited to the 1.3 test, which he believed would not apply, and "absent all other protections which exist, which we are not talking about," such as Section 7. A 1030-1031. And appellant neglected to advise the Court of the trial court's holding that the 1.3 test would itself apply to such a proposal. With good reason, appellant does not repeat this argument in its brief on the merits.

Appellant next attacks the Section 7 certification itself, A.B. 31-35, though in quoting Mr. Goldberg at page 33, it omits his immediately following statement that the certification requirement "has helped to allay the fears of the financial community," A 840, fears related directly to deficit rail mass transit, A 839-840. Appellant says first that the certification requirement could be avoided by manipulative legislative definition, arguing that this was attempted in 1971 and that, "It was the Covenant, therefore, which protected the bondholders, not Section 7." A.B. 33. In fact, it was bond counsel who "protected" the bondholders, A 692, and nothing in appellant's argument suggests that bond counsel could not, in the future, "protect" the bondholders by opining that, legislative definitions notwithstanding, a Section 7 "additional facility" is an "additional facility." See A 100.

Following a brief complaint that Section 7 blocks only a "material impairment" and not "any impairment" and its incomplete quotation from Mr. Goldberg, appellant continues its attack on the Section 7 certification by claiming that "Unlike the Section 7 certification, the 1962 covenant requires certification of an ascertainable amount. . . ." A.B. 34. Appellant is incorrect. According to the statute, it is enough to certify simply "that said other railroad facility is self-supporting."[19] And Mr. Zarin, though questioned at length on this precise point by appellant's counsel, specifically declined to testify that the 1962 covenant requires the certification of an amount when a facility is certified as "self-supporting." A 1082-1083.

Appellant goes on to argue that a covenant certification "requires considerably more precise a calculation" because it would be for "a single proposed facility," whereas a Section 7 certification would be for many facilities. A.B. 34. The fallacy is tempting, but a fallacy nonetheless: if

19. See N.J.S.A. 32:1-35.55, subdivision (iv) under "Permitted purposes."

the calculations for the many-facility certification are off, it must be because calculations for one or more individual facilities are off, and it is just as likely that the railroad calculations are wrong. Indeed, in many contexts, projections for a group of enterprises are regarded as more dependable than projections for a single enterprise.[20] At best, the benefit claimed by appellant is marginal, uncertain and contrary to the pooling concept that has been the basis of the Authority's financial success since the General Reserve Fund statutes of 1931 and the Consolidated Bond Resolution of 1952. See A 736. The trial court was clearly right in giving this argument "little weight." A.B. 34.

Appellant continues to argue that the covenant's use of "self-supporting" is more precise than Section 7's use of "materially impair" by quoting at length from Mr. Thompson's testimony, including his statement:

> "Now, self supporting, Your Honor—although it sounds as though it can be a qualitative phrase is not, at least not in our business." A.B. 35.

Mr. Thompson also testified that "self supporting means that the revenues shall be *estimated* to be at least as much as the operating expenses plus the debt service *which is a mathematical requirement* . . . ." A.B. 35; emphasis added.

Mr. Thompson's belief that "self-supporting" is a precise phrase has been emphatically rejected by the Farley Committee, by the Port Authority, and by its independent

20. The Port Authority may well provide such a context in view of the necessarily arbitrary way that it allocates its substantial general and administrative expenses and debt service among its facilities. See Stip., Ex. IV at Volume VI of the Joint Appendix below. Appellant admits that the Authority's single facility estimates for the Hudson & Manhattan were way off, A.B. 14, 15, 67. The record shows that the Authority's estimates for the construction of the World Trade Center were off by about $700 million. *Compare* A 182 *with* A 486. Yet the Authority as a whole has had great financial success—Barr Brothers calling it "one of the finest revenue credits in the country" even after the trial court's decision sustaining repeal, A 422-423.

auditors. Because the concept is "arbitrary" and "not based on actual fact," the Authority's accounting procedures do not use it. A 650-651, 660, 735a2-736. As Peat, Marwick, Mitchell & Co. put it,

> "The Authority's financial structure is based on a single enterprise, pooling of revenues concept. Individual facilities are not financed independent of the rest of the Authority. The facilities contribute their revenues for debt service according to their earning power without regard to the amount of bonds which were issued for their construction. For these reasons any presentation of net revenues after debt service for individual facilities is not based on actual fact. As pointed out by the Authority in submitting its report, such a presentation can only be based on arbitrary assumptions." A 651.

Thus, the ground on which appellant claims the covenant to be a greater bondholder protection than Section 7 literally does not exist.

Appellant's only other attempt to demonstrate the objective importance of the covenant is its assertion that it would have prevented the Port Authority's financial participation in the PATH-Plainfield project, which, says appellant, A.B. 35-36, is "presently estimated to require a diversion of pledged revenues and reserves of at least $128.4 million. (R-Ja 255-1)." The argument is confusing because based on a plan that was rejected by the federal Urban Mass Transportation Administration and not on the plan currently before that agency for approval. See A 527-528, pp. 60-62, *infra*. But even assuming that the now rejected plan can be considered as the type of plan that bondholders can expect, it is clear that they will not be hurt. Appellant's argument gives no weight to the fact that the actual source of the Port Authority's participation is the more than $40 million in annual revenues that the Authority has already begun to collect as a result of the toll increase instituted in

May 1975 for the specific purpose of financing mass transportation projects. See A405-407, 419-421, 503, 528.[21] In three or four years, the Port Authority will have earned the entire $128.4 million even though it will have spent far less. Significantly, appellant does not suggest that the toll increase would be justified or appropriate if, contrary to the Port Authority's public announcements, cited above, the increased revenues were not applied to financing mass transportation.

21. Extraordinary as it may seem, appellant attempts to show that the $40 million does not exist. A.B. 38. For example, it invents something it calls "surplus reserves in excess of mandated bonded debt service" and asserts that its creature grew by only $296,000 in 1975. In support of its analysis, appellant invites the Court's attention generally to the 39-page 1975 Annual Report of the Port Authority, citing three cases for the proposition that the Court may employ judicial notice to that end. No page or chart of the Report itself is cited.

The relevant portions of the Port Authority's 1975 Report are set forth in the Appendix, A 503-518. They show that in 1975, the Authority's gross operating revenues rose from $410.4 million to $458.4 million, a gain of $48 million, A 511, 515; that net revenues available for debt service and reserves after payment of operating expenses rose from $181.4 million to $200.9 million, a gain of more than $19 million, A 515; that the General Reserve Fund increased from $173.4 million to $176.4 million, a gain of $3 million, A 518; that the Consolidated Bond Reserve Fund grew from $46.8 million to $62.4 million, a gain of more than $15 million, *id.*; that the Authority's total assets grew from $3.186 billion after depreciation to $3.249 billion after depreciation, a gain of approximately $63 million, A 513; since total liabilities rose by less than $7 million, net assets grew by $56 million, *id.* It is worth remembering too that 1976 will be the first *full* year in which the toll increases have been in effect.

Appellant emphasizes that operating expenses also rose by over $37 million, "more than consuming any new revenues resulting from the toll increases," A.B. 38. Very little of that increase in expenses, however, is attributable to bridges and tunnels. Since appellant does admit that the Authority's net operating revenues and reserves did in fact increase, it appears to have charged all increases in costs at all of the Port Authority's facilities against the toll rises, instead of following the accepted procedure of charging each facility's operating expenses against its operating revenues. This bit of creative accounting is no more supportable than the rest of appellant's analysis.

c. *The subjective fears.* Appellant's case rests not on what the covenant objectively added to bondholder protection, but on misinformation and unfounded fears.

Appellant offered only one witness to testify about the circumstances surrounding the enactment of the 1962 covenant—John F. Thompson, Vice President of W. H. Morton and Company. A 844. Mr. Thompson testified that in 1961, "[M]y reaction to the Port Authority getting into that [the Hudson and Manhattan] or other mass transit was one of concern because the Port Authority has always gone into projects which it could reasonably ascertain that they would become self-supporting, at least within a period of a few years of development and this seemed to be a different tack for the Port Authority to start on." A 855. Mr. Thompson amplified on cross-examination, A 959-960:

> "A. The facilities acquired or constructed up to then had all been expected eventually to become self-supporting. H & M was not.
>
> Q. Self supporting at what point in the future?
>
> A. Within a reasonable time, within three, four, or five years.
>
> Q. Were those expectations fulfilled, to your knowledge? . . .
>
> A. I am not sure that my facility knowledge of the Port operation is sufficient to give you a full and accurate answer. I have understood that one or two facilities from time to time have not done as well as hoped, but on the whole the reverse is true. . . .
>
> Q. So your assumption that the Port Authority's moving from what had been almost entirely, with one or two exceptions, profitable enterprises to mass transit was a major factor in your concern about the acquisition of the Hudson and Manhattan?
>
> A. Yes, it was a factor of concern."

Mr. Thompson was thoroughly misinformed. As of December 31, 1960, the Staten Island Bridges had been in deficit for 22 years, the Port Authority Building for 21, and

Newark Airport for 13. Of all Port Authority facilities, only the piers and Port Newark had run at a deficit for as few as 3 or 4 years. Everything else had been in deficit for at least 7 years and most had been in the red for 10 years or longer. A 691.[22]

Mr. Thompson testified next that "if one step were made into mass transit, the question arose in the minds of most participants in the investment community, what comes next, what other projects in mass transit will next be undertaken." A 855-856. On cross-examination, however, he was unable to answer whether most investors knew that the covenant did not prevent the Port Authority from operating bus lines at a deficit. A 961.

Mr. Thompson also testified that he had never considered the fact that the covenant leaves the Port Authority exposed to massive deficits ten years after certification of a passenger railroad under the covenant. A 943-944. He did not believe bondholders needed covenant protection against that risk: he was content to rely on the good faith of the States, A 945, the unwillingness of the Port Authority to go along, A 947, and the resistance of the bond market, A 946.

The point is important. The protection actually afforded by the covenant is far more modest than Mr. Thompson and the other witnesses understood. It could be satisfied by simple agreement between the Governors and the Port Authority Commissioners that a facility would be self-supporting. Even though a railroad were expected to run

22. And see A77n. 15: "For the calendar year 1973, of the 22 facilities operated by the Authority, 14 were operated at a deficit." See A 397.

That appellant's chief witness was so totally misinformed about the deficits of individual facilities further demonstrates that appellant is wrong in urging, A.B. 5-8, the importance of the concept that each facility be self-supporting by itself. If that concept had any importance, Mr. Thompson would have known about the long deficit history endured by each of the Authority's major facilities.

at a deficit, that agreement would satisfy the covenant's definition of "self-supporting" if it were backed up by the agreement of the States to pay the deficits for ten years *and no longer*. The covenant's definition of "self-supporting" would also be satisfied if the States agreed to continue their payments for more than ten years but at the same level paid during the first ten years, leaving the long-term growth in the deficit for the Port Authority to absorb.

As Mr. Thompson acknowledged, it was not the covenant that protected against these hazards, but other bondholder protections. He noted the unwillingness of the States to inflict actual damage on bondholders, the parallel concern of the Port Authority and the pressure of the bond market, three formidable safeguards. The Section 7 certification, among others, is germane too.

Mr. Thompson also believed the covenant's definition of "self-supporting" to be a "mathematical requirement," A.B. 35, though he admitted that it was based on "estimated" revenues, A.B. 35, and though the Farley Committee, independent auditors and the Port Authority all recognized it could "not be based on actual fact" but only "arbitrary assumption." A 651.

Not only was Mr. Thompson misinformed about or ignorant of the actual meaning of the covenant and the Authority's history of successfully carrying deficit facilities; he was also unaware that other bondholder protections fully protected against his fears. Thus, he believed that the covenant was necessary to prevent "the possibility of massive deficit operations getting into the Port structure" and "that if the Port Authority were given a white elephant that all of the revenues of the Port operation, operating revenue, would be pooled in order to support that before debt service would be paid." A 949. The witness repeated the point at A 942, and concluded cross-examination on this question by testifying that, "I believe

that this is one situation that might arise that makes the covenant important." A 956.

Mr. Thompson obviously did not understand that his opinion was ill-founded and that even without the covenant "massive deficit operations" could not get "into the Port structure," for the reasons explained by Mr. Goldberg before the enactment of the covenant, A 838-840. Nor did Mr. Thompson understand that, as Mr. Zarin testified, A 1050, Section 7 of the Series Resolutions prohibits the use of the reserve fund to pay the operating deficit of a facility acquired without the issuance of Consolidated Bonds, *i.e.*, a "white elephant."

No wonder Mr. Thompson considered the 1962 covenant "an important and significant part of what I presumed we were buying for our clients." A.B. 23, A 873. He was misinformed about the precision of the "self-supporting" concept, the facilities history of the Authority and its ability to undertake many deficit operations, and the many other protections against any deficit operation that would threaten bondholder security.[23]

Mr. Thompson was the only witness offered to testify about the circumstances surounding the enactment of the covenant as well as the only witness offered by appellant who purported to have any detailed knowledge of the workings of the covenant or its relationship to other bondholder protections. It follows that the record is barren of evidence that anyone informed about the rights of bondholders in the 1961-62 period regarded the covenant as important to

23. As *Amicus* S.I.A. says at page 13, Mr. Thompson was also the witness who testified "that if the Governor of New Jersey had recommended repeal of the covenant *before* the sale of $300,000,000 of bonds of the New Jersey Sports and Exposition Authority instead of one week *after* the sale, the bonds would not have been saleable. . . ." This was not only Mr. Thompson's personal opinion; he "heard no professional investment person who disagreed with this." *Amicus* 14. The sale of the Sports and Exposition Authority bonds was held on January 18, 1974. As appellant's brief correctly notes, Governor Byrne proposed repeal as early as June 1973. A.B. 27, n.16.

bondholders.[24] The evidence that Mr. Tobin sought the covenant to further his views of the Port Authority's mission is corroborated by the objective unimportance of the covenant. See A 108-109.

2. *The Authority's consistently high credit rating demonstrates the unimportance of the covenant and repeal*

The trial court found that the "limited role of the covenant on the Authority's credit standing is also reflected in the ratings assigned to Port Authority bonds by the principal ratings services, Moody's and Standard and Poor's." A 110. The Moody's and Standard and Poor's ratings for Port Authority bonds have been and are "A," meaning that "they are of investment quality and no default in payment of principal or interest is anticipated." A 110, 849.[25] The bonds had that rating before the covenant was enacted, after it was enacted, after it was prospectively repealed, after the repeal at issue in this lawsuit, A 110, 750-763, and after the decisions below, A 481-500, 1123-1131.

24. No officer or employee of appellant testified, nor did appellant offer any of its purchase or sale records to show that the covenant had any bearing on its transactions in Port Authority bonds.

In an attempt to make up for the missing evidence, appellant refers, at A.B. 12 n.9, to the deposition of its Executive Vice President even though that deposition *was not admitted into evidence*. The trial court's ruling excluding it, A 1121-1122, was clearly proper and has not been appealed to this Court.

Had appellant's Executive Vice President testified, he would have been exposed to cross-examination about his approval of an April 1974 internal memorandum stating: "Efforts to repeal the 1962 covenant by legislative action should not be viewed with alarm." E454.

25. Thus, this is emphatically not a case in which the obligor "unilaterally" decides that default is improbable. Compare A.B. 67. Appellant has never alleged or offered any evidence to show that the Authority's bonds are in any danger of default whatsoever and the Barr Brothers report issued after the trial court's decision sustaining repeal concludes that the Authority's bonds offer "secure value for the investor," A 423.

In arriving at its "A" rating, Moody's has always given full weight to the prospect of deeper Port Authority involvement in passenger railroads. As early as February 1972, it recognized the relevance to the Port Authority of the increase in Triborough vehicular tolls to support rail mass transit. A 258-259. Its June 1973 report referred specifically to the enactment of bi-State legislation pursuant to which "the Authority will contribute to the capital cost of passenger rail projects." The report, rating the 40th series "A," continues: "In addition, this new legislation amends 1962 statutes which served as the basis for a statutory covenant limiting the Authority's ability to participate in deficit passenger railroad projects. These deficit limitations will not apply to the holders of bonds hereafter issued by the Authority, including these bonds." A 264-265.

The Moody's report for October 5, 1973, A 750-751, rates the 41st series "A," while noting "the clouded future surrounding . . . the role, if any, which Port Authority will play in a regional mass transportation system." The two-paragraph summary on the front page of the report also notes that a "suit now in the Supreme Court of New York State seeks to permit unlimited application of surplus Authority funds to deficit passenger railroads. *If the suit is successful,* demands for mass transportation would probably obstruct further Authority expansion into other fields. *Bondholder protection would remain adequate, because debt service constitutes a first lien on net revenues.*" A 750-751; emphasis added. Thus, even on the express assumption that the covenant would be struck down, Moody's adhered to its high rating of Port Authority bonds.

Within two weeks after the trial court's decision sustaining repeal of the covenant, leading investment advisers agreed with the opinion that repeal was not material. Thus,

Barr Brothers & Co., one of the three largest dealers in Port Authority bonds, A 978, issued a report specifically referring to the trial court's decision, summarizing the other bondholder protections and the great financial strength of the Port Authority, and concluding:

> "Whether or not the Port Authority ever gets involved in Mass Transit, we feel it continues to be one of the finest revenue credits in the country, amply protected by the basic bond resolution, excellent management and some highly profitable and monopolistic facilities that can more than carry a reasonable amount of Mass Transit, particularly with the recent toll increases on the Hudson crossings providing additional revenues." A 422-423.

This report is from a firm that is a member of the class represented by appellant and from which it selected one of its three expert witnesses.

In June 1975, the month after the trial court's decision, Standard & Poor's and Moody's each confirmed the continuation of the Port Authority's "A" rating. Standard & Poor's, while expressing a concern about the effect of future Port Authority involvment in mass transit, says: *"Despite this concern, we are continuing our 'A' rating on the Port Authority's Consolidated Bonds and are also rating the new Consolidated Notes 'A' based upon the Authority's strong operating, financial and management record and the prospect for a continuation of this outstanding record."* A 482; original all in emphasis. Moody's, also referring to the trial court's opinion, continues its "A" rating on Port Authority obligations because "earnings of the present facilities are good, reserves for debt service continue strong, and recent toll increases have further strengthened its financial position at this time." A 484-485.

In July 1976, the Port Authority issued its 42nd series of Consolidated Bonds. Standard & Poor's simply continued its "A" rating without writing a new report. A 1124.

Moody's continued its "A" rating in a report stating that while the decisions in this case "are a matter of deep concern to bondholders generally," in so far as the Port Authority is concerned, "earnings of the present facilities are good and reserves for debt service continue strong." A 1126.

That the Port Authority's high credit rating accurately reflects the objective unimportance of the covenant is further demonstrated by S-36, an 8-page single-spaced publication of Blyth & Co. on the 36th series issued in November 1970. A 279-292. Blyth & Co. advises the reader that the series is intended to finance "capital expenditures in connection with the Authority's airports, docks, wharves, *mass commuting facilities* . . . ." A 280; emphasis added. The Section 7 certification requirement is set forth, the 1.3 test is duly noted, Sections 4 and 5 of the Consolidated Bond Resolution are paraphrased, the Consolidated Bond Reserve Fund is described, the General Reserve Fund and its 10 percent requirement are discussed at length, various covenants are summarized, including the Authority's promise to set charges high enough to cover debt service, *but not a word is said about the 1962 covenant.*

S-36 is not unusual in regarding the covenant as too unimportant to mention. See, for example, S-22 (J. B. Hanauer & Co.), S-42 (Bankers Trust) and S-35 (Blyth & Co.), all in Volume II of the Joint Appendix below.

3. *The unimportance of the covenant and repeal in the secondary market*

Between 1952 and 1962, the Port Authority sold 19 series of bonds, worth hundreds of millions of dollars, without the covenant. A 108. Throughout this period, various public officials and agencies were calling for greater Port Authority participation in rapid transit. A 576-671. While appellant claims without record support that these efforts were all "illusory," A.B. 30, that claim is belied by the Authority's

need to extract the "Memorandum of Understanding" from the MRTC, amend Section 7 in 1958 to add the certification requirement and constantly drum up "bondholder concern"; the claim is also inconsistent with the 1959 New Jersey Assembly report that appellant simply mischaracterizes. See p. 16 and n.10, *supra.*

On March 25, 1961, legislation requiring the Port Authority to take over the Hudson & Manhattan Railroad and containing no covenant was passed by the New York Legislature. A 90. Governor Rockefeller signed the legislation on April 6, 1961. The secondary market for Port bonds was unaffected. A 381-384.

In early January 1962, if appellant's protestations are to be believed, investor concern should have been at its height. At its previous session, the New York Legislature had adopted legislation requiring the Authority to take over the H & M; the Port Authority had announced in September 1961 that it might agree to do so if certain assurances could be obtained, A 622, but the Authority had yet to receive those assurances. Dun and Bradstreet, taking note of all this, nonetheless rated the Port Authority's prospects as "Superior," A 171, and the Nineteenth series was sold on January 4, 1962 without difficulty at an interest rate of 3½ percent. A 108.

Between 1962 and May 1973, the Port Authority issued 20 series of Consolidated Bonds at interest rates ranging from 3¼ percent to 6⅝ percent. A 110. Though the Port Authority was now operating a passenger railroad with substantial deficits and the covenant might or might not endure,[26] bondholder enthusiasm for Port bonds continued unabated.

In 1973, New Jersey and New York enacted legislation repealing the covenant with respect to bonds issued after

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26. Appellant's chief witness, Mr. Thompson, testified that he was aware at all relevant times that under certain circumstances a State may constitutionally abrogate its contracts and that other pledges had been repudiated. A 950-951, 952.

May 10, 1973. A 102-103. In June 1973, the Port Authority issued its 40th series of Consolidated Bonds at an interest rate of 6 percent. Though the covenant did not apply, appellant exercised its discretion to buy $2,570,000 of 40th series bonds for its fiduciary accounts. A 1120.

In October 1973, as New Jersey's gubernatorial race was nearing its end, the Port Authority issued $100 million of its 41st series of Consolidated Bonds. Though the covenant did not apply to these bonds and candidate Byrne had, as appellant claims, called for greater participation by the Authority in mass transportation, the bonds were sold at an interest rate of 5½ percent. A 110-111. In light of these undisputed facts, the trial court properly concluded:

> "[I]t is clear that the interest rates which the Authority has had to pay on non-affected bonds [the 40th and 41st series] were not materially affected by the absence of direct covenant protection." A 111.

At the trial, appellant attempted to show that the repeal of the covenant adversely affected the secondary market for Port Authority bonds. After a careful evaluation of the live testimony and comprehensive documentary evidence submitted to him, the trial court concluded:

> "The bottom line of plaintiff's proofs on this issue is simply that the evidence fails to demonstrate that the secondary market price of Authority bonds was adversely affected by the repeal of the covenant, except for a short-term fall-off in price the effect of which has now been dissipated insofar as it can be related to the enactment of the repeal." A 112-113.

While appellant attacks this finding at length, A.B. 38 to 47, it simply cannot overcome the fact that at the time of trial the prices for bonds of the Port Authority of New York and New Jersey and of the Massachusetts Port Authority (an agency selected for comparison by appellant, A 209-215) bore exactly the same relationship to each other

that they did when appellant's charts began (July 1973) and immediately prior to the repeal of the covenant. A 111-112, 210-211, 243, 1119. Even as of August 4, 1976, the spread between Mass. Ports and New York Ports was the same as it had been in July 1973, April 1974 and February 1975. A 1131.

Appellant's statement, A.B. 41, that the "sharp rise" in Port Authority bond prices "in January 1975" was "caused by purchases to cover short sales in the preceding month" demonstrates, if anything, that the prices were artificially low at the end of 1974, when appellant's charts as submitted during Mr. Thompson's testimony end, see A 210-211, 213-214. Appellant's further characterization of the relationship between the bond prices of New York Ports and Mass. Ports as a "short term technical situation," A.B. 43, is, respectfully, ridiculous since the relationship has remained the same in the 18 months since trial, A 1131.[27]

Appellant also would have the Court believe that "the quoted bid prices for the Port Authority bonds since the repeal are artificially high, because, as noted above, an attempted sale of any block of Port Authority bonds, which could have been sold at the quoted price prior to repeal, would now force the quoted prices substantially lower."

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27. Appellant complains, A.B. 44, that the trial court ignored evidence relating to Kansas Turnpike and Indiana Toll Road bonds, the only issues selected for comparison by Mr. Murphy, A 988, from "roughly two hundred issues" in which he maintains an active market. A 975. But the evidence cited in the text demonstrates that the bonds of the Port Authority of New York and New Jersey behaved no differently vis-a-vis the Kansas and Indiana bonds than did the bonds of the Massachusetts Port Authority. See also A 989-991 (toll road agencies, unlike the Port Authority, do not have one-third of their assets invested in a real estate market that was severely depressed in 1974, nor do they have major investments in airports that were hit hard by the sharp drop in air traffic in 1974). Moreover, the two toll road bonds selected by Mr. Murphy went up sharply in price in mid-1974, accounting for the entire increase in the spread between the toll road bonds and the New York-New Jersey and Massachusetts Port bonds, while the rest of the bond market was declining. A 992-993.

A.B. 41. The disproof of this pudding occurred in July and August 1976 when the Authority issued its $100,000,000 42nd series. Though Mr. Thompson had testified that his calculations showed that a new issue of Port Authority bonds "would immediately drop the secondary market for all other Port issues . . . by some 6 to 10 points," A 940, in the month following issuance of the 42nd series, the prices of all three New York Port bonds quoted in *The New York Times increased,* A 1131, and the new bonds, offered through a syndicate including many of the nation's largest investment houses, quickly sold out at a premium. A 1124.

Appellant further complains, A.B. 40, that the trial court "ignored the expert testimony with respect to the 'thinness' of the market," though it admits two pages later, A.B. 42, that the trial court "referred to the testimony as to the thinness of the market." In fact, appellant's evidence on this point was contradictory and internally inconsistent. Appellant's witnesses, having been sequestered, testified that: (1) after repeal, people could not buy Port bonds because nobody would sell; (2) after repeal, people could not sell their Port bonds because nobody would buy; and (3) there was a rush of selling. Thus, Mr. Thompson testified that "all of the professional investors I know" decided to hold on to their Ports. "As a consequence the flow of bonds into the market is much less than it normally would be." A 879. Mr. Fitzgerald testified that immediately after repeal, "there was a reasonable amount of selling, but . . . to have had the selling, you would have to have people who are willing to stand up and buy bonds as well . . .," A 1100, and after repeal investors would no longer buy Port bonds. A 1092-1093. And Mr. Murphy testified that, "the size of the market I would say immediately after the repeal was quite active. I would say that there was substantial selling of Port Authority bonds. As time went on, it became increasingly heavier, particularly at the end of the year, because a number of institutions and fiduciaries availed

themselves of the opportunity of selling Port bonds to establish tax losses." A 984. Presumably they were selling to somebody.

In the face of this conflicting testimony, appellant's failure to offer any records documenting the volume of purchases and sales of Port Authority bonds, and the evidence showing no adverse effect on market prices, the trial court properly found that repeal of the covenant had no significant adverse effect on the secondary market for Port Authority bonds. A 112-113.[28]

F. Legislative History of the Repeal of the 1962 Covenant

Appellant objects to the above heading in the trial court's opinion, A 98, as "misleading because there is, in fact, no legislative history attendant upon the repeal of the 1962 Covenant." A.B. 26-27 n.16. In fact, as the record demonstrates, the years immediately preceding repeal saw repeated and extensive legislative consideration of the vital question of the Port Authority's role in rail mass transit. Relevant legislation was enacted in both States in 1971, in New York in 1972, in both States in 1973 and again in 1974. A 629, 703-707. The introducer's statement annexed to New Jersey's repeal of the covenant refers specifically to the 1972 legislation. A 103, 773. Similarly, during the 1974 legislative debate on New York's repeal, explicit reference was made to the efforts over the prior four years to increase the Port Authority's participation in rail mass

28. Though much of the testimony of appellant's experts about the market for Port bonds was conflicting and contradictory, there was no disagreement about one proposition. In response to requests for advice about whether to buy Port bonds, Mr. Thompson testified: "With regard to purchase, I simply for the most part agreed with them that it wasn't a very wise thing to in effect buy into a lawsuit." A 882. If anything has happened to the market for Port Authority bonds, even though the prices do not reflect it and appellant's experts disagree over what it is, investor reluctance to buy into a lawsuit offers a classical explanation.

transit, A 769, 771-772. This four-year effort was also cited in the October 1975 report of a Joint New Jersey Legislative Committee investigating the Port Authority. A 164.

1. *The energy crisis*

In early 1974, while repeal of the 1962 covenant was before the Legislatures of New Jersey and New York, both States and, indeed, the entire nation, were in the throes of a paralyzing energy crisis.[29] On November 27, 1973, Congress had enacted the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. sections 751 *et seq.*, directing the President to promulgate regulations for the mandatory allocation and pricing of crude oil and refined petroleum products. 15 U.S.C. section 753(a). In enacting this statute, Congress specifically found that the hardships caused by the oil shortage:

> "jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare." 15 U.S.C. section 751(e).

On January 14, 1974, the Federal Energy Office promulgated its Mandatory Petroleum Allocation and Pricing Regulations for monthly allocations of gasoline. The January and February 1974 allocations to New Jersey and New York were totally inadequate to meet the demand for gaso-

29. Appellant claims that the repeal was proposed by then-candidate Byrne "in June, 1973, well before the energy crisis." A.B. 27 n. 16. In fact, as early as April 18, 1973, there were Presidential Proclamations establishing the National Energy Office and attempting to reduce oil imports, see 38 Fed. Reg. pp. 9645, 9657; by June 1973, Governor Love of Colorado had been appointed to head the Energy Policy Office and the President had released a lengthy statement on the nation's energy resource problem. See *N.Y. Times*, June 30, 1973, pp. 1, 20; 38 Fed. Reg. p. 17711.

In any event, the evil existing *at the time the Legislature acted* is obviously the controlling factor, and appellant concedes that the nation was afflicted by a grave energy crisis in 1974, A.B. 56.

line in those States. The result was chaos, as most service stations closed and the few that remained open were besieged by long lines of motorists. A 552-553. Local law enforcement, first aid and fire fighting personnel were inadequately supplied, while ordinary citizens immobilized by the lack of gasoline and suitable public transportation alternatives could not go to work, shop for necessary food supplies or obtain medical service. *Id.*

The legislation repealing the 1962 covenant was introduced on February 15, 1974, A 434, 763 n., at the very height of the energy crisis. Eleven days earlier, the New Jersey Legislature had enacted the Emergency Energy Fair Practices Act of 1974, which found "that an energy shortage now exists and may continue for the foreseeable future"; ten days earlier, Governor Byrne, in his first Executive Order, had proclaimed that an energy emergency existed. A 551-552.[30]

Though there is no shortage of gasoline in the State of New Jersey at the moment, there was a desperate shortage immediately before the Legislatures acted and that shortage could recur at any time. Moreover, the enduring effects and implications of the energy crisis are very much with us now, as Congress and the President continue to wrestle

30. Appellant's contention that there was no publicly expressed relationship between the repeal of the 1962 covenant and the energy crisis, A.B. 56, 66, is disingenuous. As shown by the articles appearing at A 425-438, on February 12, 1974, New Jersey Department of Transportation officials appeared before the I.C.C. to protest the Port Authority's request, in the middle of the energy crisis, for a 66% increase in the PATH fare. One or more Commissioners of the Authority thereupon threatened to withdraw Port Authority support for new rail mass transit projects that the Authority and the States had been hoping could satisfy the covenant. New Jersey's bill to repeal the 1962 covenant was introduced within two days of this threat.

The relationship between repeal and the energy crisis was also expressly noted in the New York legislative debate. See pp. 49-50, *infra*. And, of course, the relationship between legislation permitting increased support for mass transit and the energy crisis was obvious to everyone concerned.

with measures to reduce our dependence on foreign oil. On February 21, 1974, President Nixon discussed the long-range and "no less difficult" problem the nation would face when the oil embargo ended and observed: "It is now widely recognized that the development of better mass transit systems may be one of the key solutions to both our energy and environmental problems." A 106, 555-556.

Congress has repeatedly agreed. For example, the Regional Rail Reorganization Act of 1973, enacted on January 2, 1974, contains specific findings that "rail service and rail transportation offer economic and environmental advantages with respect to . . . energy efficiency and conservation . . . to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest," and that "railroads are one of the most energy-efficient modes of transportation for the movement of passengers and freight." A 107, 547-549. See also the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. sections 791 *et seq.*; and the National Mass Transportation Assistance Act of 1974, A 99 n. 29, 719-723. During the debate on the last of these statutes in late 1974, Congressman Minish of New Jersey, one of its principal sponsors, reminded Congress:

> "With our present energy situation and the threat of a renewed crisis in this area, the need for mass transit aid has become ever more critical. Buses and rail cars consume only a fraction of the energy that a private automobile does, yet we cannot expect the commuting public to reduce significantly its use of private cars if we do not provide suitable alternative sources of transportation." A 721.

See also the statements of Senator Williams of New Jersey and Representative Abzug of New York at A 720-721, 722-723.

The energy crisis, which was totally unexpected when the covenant was enacted in 1962, made it essential that the

States invoke their police power to facilitate greater participation by the Port Authority in the development of rail mass transit. The Port Authority, absent the covenant, is in a unique position to impose higher costs upon the cars using its bridges and tunnels, thereby discouraging their use, and to apply the increased revenues from the higher tolls to improved and expanded rail mass transit. The Port Authority was, after all, founded upon the understanding that great benefits would accrue from *coordinated* transportation in the Port District.

The energy implications of this coordinated approach are obvious and were recognized by appellant's chief witness, John Thompson, when he wrote to *The New York Times* on May 1, 1974, the day after Governor Byrne signed New Jersey's repeal:

> "A broad view of urban and energy problems suggests that government should act to discourage auto traffic into major cities in favor of the greater use of mass transit. This would probably involve a sizable shift of funds from charges imposed on automobile traffic to the support of mass transit; to do this is an exercise of the state police power, and it should be done in this instance by the two States themselves, and applied to all automobile traffic entering Manhattan." A 245-246.[31]

Just a few days earlier, Assembyman Koppell had told the New York State Assembly during its debate on repeal that:

> "If anything indicates the necessity of increased funds for mass transportation, it is the energy crisis

31. If, as appellant claims, A.B. 56, 66, the relationship between repeal and the energy crisis is mere coincidence and after-thought, it is curious that appellant's chief witness made the connection publicly and immediately and that he recognized the need for an exercise of the States' police power. *Barron's* too observed immediately that the covenant "has fallen victim to the energy crisis." Ja90.

> in which we are involved and which threatens our whole society. I think this legislation is critical. I think this legislation is certainly one of the most important things that we can do today, and is undoubtedly one of the most important steps that we can take to improve mass transportation." A771.[32]

The 1962 covenant, enacted in an era of cheap and plentiful oil, became a harmful anachronism in the very different world of 1974. See A 769.

2. *Health and environmental factors*

The early seventies were also a time of unprecedented efforts to alleviate the health hazards associated with air pollution, efforts of a scope and magnitude unknown in 1962. The federal Clean Air Act Amendments of 1970, 42 U.S.C. sections 1857 *et seq.*, provided major impetus. They authorized the Administrator of the federal Environmental Protection Agency to establish national air quality standards and to prescribe, upon the failure of a State to do so, the steps necessary to achieve compliance with those standards. A 105.

The technical background with respect to the federal air quality standards for carbon monoxide is summarized at A 561-564; hydrocarbons are discussed at A 564-565. Briefly, the National Air Pollution Control Administration found that even low concentrations of carbon monoxide affect the senses and produce undesirable cardiovascular

32. In the face of this statement, which is included in the Stipulation and which we have repeatedly cited in the courts below, the first footnote on page 7 of appellant's reply to our motion to dismiss said: "Not one legislator from either state, nor either Governor, publicly expressed the most casual connection between retroactive repeal of the 1962 Covenant and any energy or environmental problem." The second numbered paragraph at A.B. 56 continues to imply strongly, but erroneously, that no reference was made to the energy crisis during the legislative debate on repeal.

changes. A 561-562. With respect to hydrocarbons, it found that their presence in the air causes irritation of the eyes, upper respiratory tract and skin, visibility reduction and vegetation and material damage. A 564. As for the source of the pollutants, the studies are consistent. In the New York Metropolitan area, an estimated 95.5 per cent of all carbon monoxide emissions come from transportation. A 561.[33] Motor vehicles are responsible for 49 per cent of hydrocarbon emissions. A 564. Automobile exhaust emissions are "the primary source of air pollution in the City of New York." A 104.

On November 13, 1973, after the State of New Jersey failed to present an acceptable plan for achieving compliance with the national air quality standards for hydrocarbons and carbon monoxide, the Administrator of the federal Environmental Protection Agency promulgated regulations designed to achieve a 67 percent reduction in hydrocarbon emissions and a 47 percent reduction in carbon monoxide emissions in the northern part of New Jersey. A 105; 38 Fed. Reg. 31388 *et seq.*[34] The federally mandated plan for New Jersey includes the "application of certain transportation control measures including a requirement for a significant reduction in vehicle miles traveled." A 105; 38 Fed. Reg. 31389.

The Administrator stated that although the Environmental Protection Agency attempted to avoid the imposition of "impractical" measures in 1977, the year by which the State was to be in compliance, "a regulation has been

33. In *Friends of the Earth* v. *Carey*, 535 F.2d 165, 180 (2d Cir. 1976), the court observed that carbon monoxide air pollution in New York City has "climbed to over five times the federal health standards." The court ordered enforcement of a federal EPA plan calling for, among other things, the imposition of tolls on the free vehicular bridges into Manhattan. 535 F.2d at 171 n. 7, 180.

34. The parties stipulated that judicial notice could be taken of these regulations, A 567, and they have not been reproduced in the record.

included to limit gasoline sales in 1977, but it will be used only if the standards have not been attained by these other measures." 38 Fed. Reg. 31389.

As the trial court observed, A 105, the Administrator emphasized the importance of the development of mass transit to the improvement of New Jersey's air quality:

> "The development of large-scale mass transit facilities and the expansion and modification of existing mass transit facilities is essential to any effort to reduce automotive pollution through reductions in vehicle use. . . . Many improvements are being planned in mass transit facilities in the State that will make it possible for more people to use mass transit instead of automobiles. . . .
>
> "The Administrator actively supports the immediate and large-scale purchase of additional public transportation facilities, including additional buses and an expansion and improvement in the available rail transit system. The Administrator also encourages close examination of such measures as fare reductions, State taxes to encourage VMT [vehicle miles traveled] reductions while raising revenue to benefit mass transit, . . . elimination of commuter discounts on toll facilities in the affected Regions, and possibly an increase in tolls during peak commuting times to encourage carpools." 38 Fed. Reg. 31389.

The 1962 covenant was at cross-purposes with the Administrator's position. By its terms, the covenant impeded the "development of large-scale mass transit facilities and the expansion and modification of existing mass transit facilities," which the Administrator called "essential to any effort to reduce automotive pollution through reductions in vehicle use." And given the robust health of the Port Authority's revenues and reserves, the Federal Highway Administrator would probably disap-

prove,[35] and the Governors would never have approved, any increased tolls on Port Authority bridges and tunnels, as suggested by the Environmental Protection Administrator, unless some of the new revenue were applied to support rail mass transit. Yet the covenant, as interpreted by Mr. Tobin to the Legislatures in 1971, precluded the use of increased vehicular tolls for rail mass transit. A 689.

3. *The Port District's public transportation requirements*

The pivotal importance of adequate passenger rail transportation to the welfare and economy of the State of New Jersey has never been denied by appellant. See A.B. 66, where appellant finally admits:

35. The tolls charged on the Authority's bridges are subject to the Bridge Act of 1906, 34 Stat. 84, 33 U.S.C. §491 *et seq.*, which provides that the tolls charged "shall be reasonable and just." The Federal Highway Administrator is authorized to prescribe such tolls. 32 Fed. Reg. 5607, 49 C.F.R. §148(i)(1). In the *Delaware River Port Authority* case discussed at A 724-726, the Administrator said that "a reasonable and just toll schedule would be one sufficient to support" all of the Authority's activities, including a rail mass transit line, A725, and referred to "the urgent need to structure toll rates for crossings in major metropolitan areas to encourage use of mass transit and carpools," A 726. The Administrator's order reducing tolls was subsequently vacated by the Court of Appeals for insufficient findings with respect to whether the reduced tolls would permit the Authority to sustain its "total activities." *Delaware River Port Auth. v. Tiemann*, 531 F.2d 699 (3d Cir. 1976).

In July 1974, the federal Department of Transportation, which includes the Federal Highway Administration, concluded in a report to Congress that:

> "in some areas (New York, Philadelphia, San Francisco), bridge toll revenues provide significant support for transit capital and/or operating costs, thereby providing transit service improvements which promote decreased dependence on automobile travel. Therefore, it would appear to be in the Federal interest to permit the imposition of tolls which would promote a more efficient utilization of the urban transportation system. Such a policy would not be unjustly discriminatory but more appropriately reflect the total costs of using the facility in peak demand periods." A 726-727.

> "If it can be said in the case at bar that the ends to be accomplished are improvement in mass transit, decrease in air pollution and conservation of energy, it must be granted that they are legitimate."

Even a brief review of the massive record demonstrates that these were precisely the ends to be served by repeal.

Prior to 1962, public concern with rail mass transit in the Port District produced little more than a stream of studies and reports. A 79-80, 605. While these reports portrayed in graphic terms the continuing deterioration of rail mass transit in the Port District—a condition to which the vehicular facilities developed by the Port Authority directly contributed, A 604, see Stip., pp. 96, 100, 108, 134-135, 139, 140-141, 154; Ex. VII, pp. 125A-126A, 130A-133A —no significant steps were taken to improve the situation until the early 1960's. A 80. Thus, when the 1962 covenant was enacted, no one knew what could actually, rather than theoretically, be accomplished by coordinated support of rail mass transit in the Port District.

Since 1962, the public attitude and policy has changed dramatically from "Why Worry?" A 601. By September 1973, the State of New Jersey had committed more than $350 million to its program, modestly begun in 1960, to maintain and improve commuter rail services. Stip., pp. 15, 144.

In New York, it was found, contrary to the 1958 report of the Metropolitan Rapid Transit Commission, Stip., pp. 109-110, upon which appellant relies at A.B. 8-9, that financial support could be obtained from existing public authorities. In addition to the Port Authority's modernization and operation of the Hudson & Manhattan (now PATH), surplus revenues of the Triborough Bridge and Tunnel Authority, including additional surpluses created by the doubling of tolls on vehicular bridges and tunnels, were applied to the deficits of subways and passenger railroads. During the

seven years prior to the end of 1974, the Triborough turned over approximately $305 million to the New York Metropolitan Transportation Authority to help support rail mass transit. A 732.

Despite this substantial infusion of funds in the years since 1962, the plight of the commuter railroads within the Port District remains critical, as the Court knows. See *Blanchette* v. *Connecticut Gen. Ins. Co.*, 419 U.S. 102, 108, 156, 159 (1974). Beginning in 1967, each of the four private companies operating commuter rail services in New Jersey has been involved in reorganization proceedings under the federal bankruptcy laws. A 81 n.21. The express policy of the State of New Jersey has been to impress upon the federal courts supervising the reorganization proceedings the necessity of continuing most of these rail services. A 546. The most recent comprehensive program of the New Jersey Department of Transportation, published in September 1973, explained the reasons for this policy:

> "Cessation of mass transportation services in these urban areas would produce intolerable conditions on the personal lives of the residents of the areas. The State is now directed by the federal government to reduce the levels of air pollution in these areas to a significant degree within the next five years. It has been determined that the existing basic rail and bus systems will fail within the next few years unless a major investment in capital facilities, equipment, and operating subsidies is provided by the public." A 546-547.

By 1970, it had become apparent that although it had revitalized the Hudson & Manhattan, the Port Authority had not kept pace either with its ability or with the need to increase its participation in rail mass transportation. Thus, in April 1970, Governors Cahill and Rockefeller announced a joint program to expand the Authority's role in rail mass transit by having it build a rail link to Kennedy Airport and

extend PATH to Newark Airport and other parts of New Jersey. A 99-100, 686.

In March 1971, legislative committees of both New York and New Jersey held joint hearings on the relationship of the Port Authority to mass transportation. The committees heard testimony, summarized at A 687-690, see further Stip. pp. 223-233, and Stip., Ex. VII, from numerous witnesses, including several recognized experts, to the following effect: the Port Authority had substantial funds available in excess of required interest and principal payments; the Port Authority's revenues could be increased substantially by doubling the tolls on its bridges and tunnels;[36] the largest commercial bank in the Port District had released a report calling for the imposition of higher and economically more reasonable charges for the use of highways and river crossings in order to transfer badly needed revenues to rail mass transit; the covenant did not add to the security of Port Authority bondholders and was simply a condition that the Port Authority made to its assumption of responsibility for the Hudson & Manhattan; passenger rail ridership within the Port District had increased substantially as a result of massive highway congestion, which was also adversely affecting air quality and intelligent land planning and use; and the Port Authority had "subverted" the efforts of the Metropolitan Rapid Transit Commission as part of its long-range effort to avoid rail mass transit in favor of the lucrative development of vehicular facilities.

During the March 1971 joint legislative hearings, Mr. Tobin stated that even if vehicular tolls were doubled, the tens of millions in increased revenues "could not go under the law [to] mass transit anyway . . . we could use them for other facilities supported by the General Reserve Fund, but

36. Executive Director Tobin predicted that doubling the Authority's vehicular tolls would raise "holy political hell," A 688, a prophecy borne out by the reactions to the 1975 toll increase discussed at A.B. 37-38. The fact remains that despite these reactions the toll increase is in effect. A 528.

you could not, under the law and the constitution, use them for mass transit facilities." A 689. The obvious barrier was the 1962 covenant.

In the light of this evidence, there was extensive discussion during the 1971 joint legislative hearings concerning possible repeal of the 1962 covenant. Assemblyman Koppell of New York asked whether the covenant could be repealed "not only for the future, but for the past" on the basis of the legislative finding "that in the exercise of our right to protect the people of the two states, we find that this covenant stands in the way of the proper development of mass transportation facilities, which is essential to the people's good and welfare." A 689.

The covenant was not repealed in 1971. Instead, after the hearings, the Legislatures tried a different course. In June 1971, they enacted bi-State legislation authorizing the Port Authority to extend passenger rail transportation to Kennedy Airport and to Newark Airport and Cranford. A 100, 692. In enacting these statutes, see Chapter 245 of the Laws of New Jersey, 1971, N.J.S.A. 32:1-35.20 *et seq.*, the Legislatures made detailed findings concerning the importance of rail access to the airports. They declared that, "Additional highway construction to serve these great airports is not feasible and creates severe problems in terms of increased air pollution . . .," that rail access "must be" provided if the Port Authority airports are "to continue to serve the economic well-being" of the area, and that "such an undertaking is found and determined to be in the public interest."

The June 1971 legislation sought to avoid the limitations of the covenant by characterizing the proposed rail links "as constituting a part of each air terminal." A 100, N.J.S.A. 32:1-35.3. However, while this legislation was pending, the Port Authority obtained opinion letters from two New York firms, Hawkins, Delafield & Wood and Davis,

Polk & Wardwell, both of which concluded that the legislation would be "ineffective to remove the facilities of the Project from the ambit of the Covenant." A 100, 692.

In December 1971, the First Boston Corporation submitted a report to the Port Authority concerning the financing of the airport rail links authorized by the June 1971 legislation. A 692-702. The report noted that "the essential problem" confronting the airport rail links "is created in the statutes and resolutions by which the Port Authority is bound; and particularly the joint State covenants of 1962, which in effect prohibit the Port Authority's involvement in additional passenger rail transportation projects unless they are self-supporting." A 692. The study stated flatly that the 1962 covenant "precludes general credit financing of any passenger transportation project, no matter how desirable, for which projections show an operating profit below debt service requirements." *Id.*

In June 1972, the New York Legislature adopted, and Governor Rockefeller signed, a bill repealing the 1962 covenant. New Jersey did not adopt similar legislation at that time. A 101-102.

In November 1972, Governors Cahill and Rockefeller announced agreement on a major plan of rail mass transportation development for the Port District. A 102, 705. The Governors proposed the extension of PATH via Newark Airport to Plainfield, direct rail service from Kennedy Airport to New York City and direct rail service to Pennsylvania Station in New York City for riders of the Erie Lackawanna Railroad.

Commenting on the environmental, energy and traffic effects of the PATH-Plainfield project, the Port Authority stated:

> "Based on 1985 traffic estimates, the PATH extension to Plainfield will generate about 9 million auto-

> mobile and bus miles in travel to and from Corridor stations. By contrast, if rail service is abandoned in the Corridor, an estimated 46.5 million auto and bus miles would be required yearly on the roads leading to Newark and New York City. The saving of 37.5 million vehicle miles per year will result in less highway congestion and less air pollution. In addition, it will be far more efficient in terms of the utilization of scarce energy resources." A 715-716.

The plan was incorporated in bi-State legislation that also repealed the covenant prospectively. A 102-103; Ch. 208 of the Laws of N.J., 1972, N.J.S.A. 32:1-35.51 *et seq.;* Ch. 318 of the Laws of N.Y., 1973.

The estimated cost of the plan was $650 million, and it was said that the Port Authority would invest between $250 and $300 million for these vital projects. A 102-103; see also A 385. It was also said that these projects would be self-supporting, but if any deficits were to materialize, they would be the Port Authority's responsibility. The 1972 Annual Report of the Port Authority stated that the necessary steps were being taken "so that construction might begin as soon as possible in 1973 on one or more of the projects. The program is expected to be completed by the end of 1977." A 386-387. Nevertheless, the covenant prevented the Port Authority from proceeding to construction of these legislatively authorized projects. The Port Authority could not participate in the financing of a passenger rail project unless that project's estimated net revenues were themselves sufficient to carry its debt service. The condition proved to be an insuperable obstacle.

As appellant states, A.B. 17 n. 14, in 1972 it was said that the PATH-Plainfield part of the package might be financed within the terms of the 1962 covenant through a federal grant of $150 million, Port Authority participation of $50 million and an advance of up to $40 million by the State of

New Jersey, to be repaid by the Port Authority. But it soon became apparent that this plan was not feasible.[37] The Authority's application for federal funds, filed in April 1974 just before repeal of the covenant, was rejected by the federal Urban Mass Transportation Administration because it failed to include the necessary certification of how the local financial share would be obtained. A 717. See also A 393-394.

G. Post-repeal Plans for Financing Mass Transit

With the covenant repealed, the Port Authority could plan and act to finance PATH-Plainfield sensibly and without any impairment of bondholder security. On April 10, 1975, the Authority announced a proposed increase in its basic bridge and tunnel tolls (which had remained constant since 1927) to raise an estimated $40 million per year to be used to help finance the PATH-Plainfield project, the Kennedy rail link, the Erie Lackawanna direct access plan and an expansion of the Port Authority Bus Terminal. See A 405-407, 419-421, 528.

The "historic revision" of Port Authority bridge and tunnel tolls, A 439, 503, expressly effected "to increase its ability to finance vital mass transit improvements," A 405, went into effect on May 5, 1975. The trial court's decision sustaining the repeal of the covenant issued on May 14,

37. In December 1972, the Director of the Port Authority's Department of Rail Transportation told an Information Session of the New Jersey Senate that PATH-Plainfield was "barely doable on a self-sustaining basis," even if the most optimistic assumptions were made. A 708-709. By 1975, after a sharp increase in the estimated cost of the project from $252 million to $347 million, A 398-399, it was clear that $40 million from the State would not do the job. New Jersey's Transportation Commissioner said so and proposed that the State assume responsibility for operating deficits. A 477. This is the position appellant characterizes as a unilateral election to renege. A.B. 18, 36.

1975. On May 23, 1975, the Port Authority submitted a revised application to the Urban Mass Transportation Administration for $277.6 million in federal funds for the PATH-Plainfield project, certifying that the 20 per cent local share of the capital cost of the project, $69.4 million, would be obtained from the proceeds of Port Authority bond sales, with the State agreeing to finance any operating deficit. A 527. The covenant would have blocked this plan because the net revenues of the project are unlikely to equal debt service. The difference between the two will be made up by increased tolls on auto traffic. The speed with which the Port Authority was able to act in April and May 1975 contrasts sharply with its inability to certify the financing of the local share of the PATH-Plainfield project so long as the 1962 covenant remained in effect. A 717.

In December 1975, the Urban Mass Transportation Administration initially rejected the PATH-Plainfield application. A 527-528, 1132-1135. The State then submitted a revised and more comprehensive financing plan, still pending before UMTA, pursuant to which the Port Authority's capital share of the PATH-Plainfield application was increased to $120 million. A 1139. Appellant agrees that this plan too would have been blocked by the covenant. A. B. 36. Since the Port Authority calculates that the increased toll revenues can support debt service on $400 million in new bonds, without any threat to bondholder security, the Authority is also planning a $160 million expansion of the Port Authority Bus Terminal and up to $120 million for mass transportation improvements in New York. A 528.

The foregoing package will actually *enhance* bondholder security while freeing many millions of dollars for mass transit. The toll rise has been generating over $40 million in new revenue for more than a year. See A 528. Though the Port Authority has begun work on the bus terminal expansion, several years will pass before the Authority will

be spending anything like $40 million per year on debt service for these projects. Since bridge toll hikes are subject to federal approval and federal policy strongly supports the application of revenues from interstate vehicular bridges to rail mass transit, see pp. 52-53, *supra*, and since the Governors would not otherwise have approved the toll increase, the extra bond reserves provided by the immediate increase in tolls could only have been obtained by linkage to a rail project.

Thus, repeal permitted a coordinated transportation program. The fare rise has an automobile-discouraging potential. The increased revenues support mass transit. Air quality will be improved, energy conserved. And bondholders are not harmed.

SUMMARY OF ARGUMENT

In the courts below, eight judges reviewed appellant's claim that the States acted arbitrarily and capriciously in repealing the 1962 covenant. Not one found merit in it. As the Counter-Statement above shows, repeal permitted the States to respond rationally to their critical need for more mass transit, a need that was dramatically emphasized in 1974 when gasoline shortages produced economic chaos and vast disruptions of life in communities without mass transit alternatives. Moreover, the best scientific data available revealed that pollution caused by automobiles in the densely populated New York-New Jersey Metropolitan area has a corrosive effect on human health. As appellant now recognizes, A.B. 66, "These problems can only be attacked by reducing vehicular traffic partially through the improvement of mass transit."

Legislation responsive to an existing public health menace and to an unprecedented energy shortage that threatened the economic foundation of the State comes before the Court entitled to a maximum of respect. These are clearly

paramount State interests, *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 606 n.2 (1973) Stewart, J., concurring).

Since appellant now admits that those paramount interests can be advanced only "by reducing vehicular traffic partially through the improvement of mass transit," and since the covenant was a serious obstacle to precisely that course, it follows that repeal of the covenant would have been constitutional even if it inflicted substantial harm on bondholders. Yet, as the Counter-Statement also shows, the private loss in this case is trivial at most. The States' repeal of the covenant in no way impairs the central undertaking that principal and interest be paid when due. Nor does repeal materially affect the security that supports that promised repayment; indeed, appellant does not allege that there is any likelihood that the bonds will not be timely paid.

The immateriality of the covenant to bondholders' economic interests is evidenced by every objective measure—whether it be the test of the market place, analysis of the tight web of bondholder protections discussed above, or the Port Authority's huge reserves fed by ever-growing revenues.

Faced with a record that fully supports these assertions, appellant chooses to deny here a proposition it conceded below: that State contracts are subject to legislative action under the State's police power.[38] In reversing

38. See, *e.g.*, appellant's reply brief in the Supreme Court of New Jersey 38: "Defendants' dissertation on the evolution of the case law interpreting the Contract Clause is superfluous since plaintiff *has never denied that the State may modify the provisions of a contract under the color of the police power* in the proper circumstances" (emphasis added); appellant's trial brief 14-15: "in rare instances a State's contract may be constitutionally abrogated by a proper exercise of the State's never abdicated police powers" and the reasonableness of the State's action is then to be determined by balancing the interests to be served against the harm done.

itself, appellant misstates the history of the contract clause, misreads this Court's relevant precedents and advances arguments that are wrong in fact and untenable in law.

The law is clear that all contracts are subject to State police power. And the incontrovertible facts of this case establish that New Jersey's police power was reasonably exercised.

The State also maintains that the covenant is voidable, an alternative ground the courts below found it unnecessary to address.[39] This Court's precedents make it clear that the modification of a voidable contract does not violate the contract clause. The covenant was voidable because it improperly amended the Port Authority Compact without Congressional consent. Finally, the State contends that the covenant was invalid when repealed because of its inconsistency with supreme federal law in the transportation, environmental and energy fields. Acceptance of either of the State's alternative arguments requires affirmance of the judgment below.

ARGUMENT

I

THE 1962 COVENANT IS SUBJECT TO THE REASONABLE EXERCISE OF THE STATES' NEVER ABDICATED POLICE POWER.

Appellant's theory that State contracts, unlike private ones, are immune from legislative alteration pursuant to the police power, A.B. 48-54, or subject to special rules because the State benefits, A.B. 64, turns logic and constitutional history upside down.

39. The argument was advanced at every stage of the proceedings below, A28-29, 129, 143, but the lower courts preferred to rest their decisions on the ground that repeal was a proper exercise of the State's police power.

A. The History of Contract Clause Jurisprudence Shows That All Contracts, Especially State Contracts, Are Subject to the State's Police Power.

The precise scope the contract clause was intended to have by the Constitution's framers is murky, if indeed a group so disparate shared any common intent. As Chief Justice Hughes noted in *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 427 (1934), "[T]he debates in the Constitutional Convention are of little aid." Moreover, unlike much of the Constitution's language, the phrase "impair the obligation of contract" has no common law antecedents to give it shape.

In any event, it is clear that the focus of the contract clause was *private* contracts, not public ones. As initially proposed to the Convention by Rufus King of Massachusetts, the clause was limited to them.[40] He took his language from the recently enacted Ordinance for the Northwest Territory, which precluded laws "that shall, in any manner whatsoever interfere with or affect private contracts, or engagements without fraud previously formed."[41] The broader language of the modern clause originated in the Convention's Committee on Style, and no debate informs us as to the reasons for the change. However, as Wright notes in THE CONTRACT CLAUSE AND THE CONSTITUTION 15-16 (1938), there is virtually no evidence that the clause was understood by the framers to apply to public contracts.

Despite the drafters' preoccupation with private contracts, the clause was held applicable to government obligations. *Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College* v. *Woodward,* 17 U.S. (4

40. II M. Farrand, Records of the Federal Constitution 439 (1911).

41. 44 Stat. 1851 (1926 Comp.).

Wheat.) 518 (1819). But contrary to appellant's presentation, the Court has always been more receptive to alterations of State contracts than private ones, because of the manifest public necessity that each succeeding legislature be empowered to respond to changing public needs. In time, the Marshall Court's rigid view of the contract clause as a barrier to nearly all retroactive legislation[42] had to yield to the expanding responsibilities of government.

The seeds of later views were sown early. First, in *Dartmouth College,* Marshall recognized that the clause was inapplicable to regulation by the States of their civil institutions;[43] second, in that same case Marshall and Story both noted that States could limit contract rights by express reservation; third, the Court ruled in *Proprietors of the Charles River Bridge* v. *Proprietors of the Warren Bridge,* 36 U.S. (11 Pet.) 420 (1837), that public grants were to be strictly construed against the grantee.

Fourth, and finally, there developed the doctrine of State police power—that the State must retain power to deal with certain public exigencies. As noted, the States could limit contract rights by express reservation, but even without such a reservation all contracts contain implied conditions intrinsic to the "obligation." For example, government must have continuing power to protect the morals and public health of its citizens. Such powers cannot be frozen

42. A view taken, it might be added, when no other basis for federal intervention against unreasonable State legislation existed. *Barron* v. *Baltimore,* 32 U.S. (7 Pet.) 243 (1833), held the Bill of Rights inapplicable to the States; *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386 (1798), held the ex post facto clause inapplicable to civil legislation.

43. He observed, "That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." 17 U.S. (4 Wheat.) at 629. The Port Authority is, of course, a "civil institution" of the States of New York and New Jersey.

by contract, particularly not by contracts made by one legislature that may be corrupt, misled or misinformed.[44] People who contract either know or ought to know that circumstances may eventuate during the life of a contract that require its alteration by the State. When such circumstances occur, exercise of the sovereign's power, while it may disappoint expectations, does not impermissibly impair any "obligation" of contract.

In *West River Bridge Co.* v. *Dix,* 47 U.S. (6 How.) 507, 532 (1848), upholding the condemnation by eminent domain of a franchise granted for a term of years, the Court set forth this theory of implied conditions:

> "But into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur."

There is, however, an important difference between implied conditions in private law and the implied conditions of sovereignty. Private parties can by the phrasing of their bargains control the scope of implied conditions, but one legislature, elected for a fixed term, has no power to bargain away central elements of State sovereignty so as to

44. The wisdom underlying the doctrine is revealed by this case. We do not question that in 1962 the Port Authority's management sincerely believed in its vision of the Authority's role. It is equally clear, however, that the Authority imposed on the Legislatures in order to further that vision. See pp. 15-16, 20, 26 n.15, *supra.*

preclude their exercise by a future legislature. This is not to say that one legislature can never bind the next, for plainly it can to some extent despite the general presumption against such a construction. The point is rather that one legislature, holding the basic attributes of sovereignty in temporary trust, cannot deny them to the future.[45]

The point was given early expression in *Newton* v. *Board of County Commissioners,* 100 U.S. 548 (1880). There an 1846 Ohio law purported to contract, for good consideration, that a particular county seat would be located permanently in Canfield, Ohio. The law was held amenable to repeal. Justice Swayne said that on many matters the States were not competent to enter into binding contracts. These matters:

> "involve *public interests* and legislative Acts concerning them are, necessarily, *public laws.* Every succeeding Legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less." 100 U.S. at 559.

Soon after, the Court wrote in *Stone* v. *Mississippi,* 101 U.S. 814, 819 (1880), upholding the repeal of a lottery franchise:

> "The question is therefore, directly presented, whether, in view of these facts, the Legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No Legislature can bargain away the public health or the public morals. The People themselves cannot do it, much

45. In *West River Bridge Co., supra,* the contract did not expressly preclude subsequent use of the State eminent domain power. In *Pennsylvania Hospital* v. *Philadelphia,* 245 U.S. 20 (1917), the contract was express and the Court held it invalid.

> less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot devest itself of the power to provide for them. For this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

The Court expressed the same principle, that on certain matters one legislature cannot bind another, in approving repeal of the New Orleans Butchers Monopoly in the second Slaughterhouse Case, *Butchers Union Co.* v. *Crescent City Co.,* 111 U.S. 746, 750-751 (1884):

> "The denial of this power, in the present instance, rests upon the ground that the power of the Legislature intended to be suspended is one so indispensable to the public welfare that it cannot be bargained away by contract. It is that well known but undefined power called the 'police power' . . . .
>
> "It cannot be permitted that, when the Constitution of a State, the fundamental law of the land, has imposed upon its Legislature the duty of guarding, by suitable laws, the health of its citizens, especially in crowded cities, and the protection of their person and property by suppressing and preventing crime, that the power which enables it to perform this duty can be sold, bargained away, under any circumstances, as if it were a mere privilege which the legislator could dispose of at his pleasure."

The issue is: what are these basic police powers inherent in sovereignty that cannot be bargained away? The early cases tended to answer with categories of State activity, *e.g.,* eminent domain, government institutions, protection of morals, protection of health, and regulation of key indus-

tries;[46] the later cases responded with an understanding that powers of government cannot be thus pigeonholed.[47]

46. The present case falls clearly within three of these, protection of health, change in civil institutions of government and regulation of key industries.

47. The trial court's opinion concisely summarizes the main cases before *Blaisdell,* A 119-120:

> "During the span of more than a century between *Ogden v. Saunders* [1827] and *Blaisdell* [1933] the court had held on numerous occasions that the states retained the power to impair contractual obligations—including those to which the state was a party—in the exercise of their always reserved police powers to act in the interest of the public health, safety and general welfare. First in dictum, *Boyd* v. *Alabama,* 94 U.S. 645, 650, 24 L. Ed. 302 (1877), and then by direct application of the doctrine, the court held that a lottery franchise granted for a definite term of years could be repealed. *Stone* v. *Mississippi,* 101 U.S. 814, 25 L. Ed. 1079 (1880); *Douglas* v. *Kentucky,* 168 U.S. 488, 18 S. Ct. 199, 42 L. Ed. 553 (1897). In *Northwestern Fertilizing Co.* v. *Hyde Park,* 97 U.S. 659, 24 L. Ed. 1036 (1878), it was held that a franchise to operate a fertilizer factory at a given location could be negated by the exercise of the police power to abate a nuisance. Similarly, the power to control the use of the public streets may not be bargained away, *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914); *Denver & Rio Grande R. Co.* v. *Denver,* 250 U.S. 241, 39 S. Ct. 450, 63 L. Ed. 958 (1919), nor can the state contractually bind itself not to exercise its power of eminent domain, *West River Bridge Co.* v. *Dix,* 47 U.S. (6 How.) 507, 12 L. Ed. 535 (1848); *Pennsylvania Hospital* v. *Philadelphia,* 245 U.S. 20, 38 S. Ct. 35, 62 L. Ed. 124 (1917), or to change the location of its governmental subdivisions, *Newton* v. *Mahoning County,* 100 U.S. 548, 25 L. Ed. 710 (1880). The broadest expression of this view of the police power during this period is to be found in *Chicago & Alton R.R.* v. *Tranberger,* 238 U.S. 67, 35 S. Ct. 678, 59 L. Ed. 1204 (1915), where Justice Pitney said:
>
> 'It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution [the Contract and Due Process Clauses] has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community, that this power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise***. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of public health, morals or safety.' (238 U.S. at 76-77, 35 S. Ct. at 682)"

The State necessarily retains residual sovereign power to meet the needs of the people. What counts is whether the power is reasonably exercised.

The leading case in the transition is *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398 (1934). At issue there was the Minnesota Mortgage Moratorium Law, a statute that stopped creditors from exercising their time-honored, bargained-for rights to take possession of and sell the mortgaged property. Quite clearly, as the dissent asserted, the legislation did just what the contract clause was originally designed to prevent--provide emergency debtor relief. Nor could the law be thought a regulation of health or morals. These categories were not stretched but abandoned. Finding that the contract clause "is not an absolute one and is not to be read with literal exactness like a mathematical formula," the Court wrote:

> "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." 290 U.S. at 435.

In trying to limit *Blaisdell,* appellant emphasizes that the Minnesota law relieved private parties, not the State, of contractual duties. The difference was indeed noteworthy: in the past, States had frequently been allowed to repudiate their own promises; *Blaisdell* held that they could also interfere with private contracts when private distress rose to the level of public concern. Acceptable justification for legislation affecting contract rights was no longer limited to a handful of categories. Rather the reserved power of sovereignty had to be seen as a general principle, its exercise limited only by reasonableness and by a need to harmonize its exercise with the policy of contract protection.

In asserting that State contracts are immune from reasonable exercise of the State's police power, appellant simply ignores the ample authority to the contrary. Moreover, the cases it does cite, A. B. 50-53, have little bearing here. *Von Hoffman* v. *City of Quincy,* 71 U.S. (4 Wall.) 535 (1867), was a mandamus action to compel the levying of taxes to pay interest on bonds in default. *Wolff* v. *City of New Orleans,* 103 U.S. 358 (1880), and *Louisiana* v. *Pilsbury,* 105 U.S. 278 (1881), were also mandamus actions. In all three cases, the challenged legislation was invoked to evade the primary obligation—payment of interest or principal. Moreover, in *Quincy,* the Court recognized that remedies for enforcing bonds can be changed if no substantial right is lost:

> "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the covenant is thereby impaired." 71 U.S. at 553.

The remedies to enforce a general obligation bond are in effect the bondholder's only legal protection: thus, in *Quincy,* the Court accepted the proposition that bondholder protections may be modified "provided no substantial right" is impaired.

While the venerability of *Wolff* v. *City of New Orleans, supra,* and *Louisiana* v. *Pilsbury, supra,* is not in question, their viability is another matter.[48] The Court's unanimous decision in *Faitoute Iron & Steel Co.* v. *City of Asbury Park,* 316 U.S. 502 (1942), upheld legislation that permitted a municipality to change the interest rate on its obligations and to extend their maturities over the objection of creditors. Whether the precise statutes at issue in *Wolff* or *Pilsbury* would today be upheld in light of *Faitoute* is immaterial. Appellant is just plain wrong when it claims, A. B.

48. Neither case was cited in any of appellant's numerous briefs to the courts below.

60-61, "It is settled, however, that a state may not impair its own contract with its citizens. The only exception to this rule is *City of El Paso* v. *Simmons*. . . ." See, *e.g., Butchers Union Co.* v. *Crescent City Co., supra,* 111 U.S. 746 (1884); *Pennsylvania Hospital* v. *Philadelphia, supra,* 245 U.S. 20 (1917); *Faitoute Iron & Steel Co.* v. *City of Asbury Park, supra; Levine* v. *Long Island R.R.,* 38 A.D.2d 936, 331 N.Y.S.2d 451 (2d Dep't), *aff'd,* 30 N.Y.2d 906, 335 N.Y.S.2d 565, *cert. denied,* 409 U.S. 1040 (1972). Leading State decisions include *New Jersey Sports & Exposition Auth.* v. *McCrane,* 61 N.J. 1, *appeal dismissed,* 409 U.S. 943 (1972); *Opinion of the Justices,* 334 Mass. 721, 136 N.E.2d 223 (1956). And see *Flushing Nat'l Bank* v. *Municipal Assistance Corp.,* A.D.2d , 382 N.Y.S.2d 764 (1st Dep't 1976).

Nor is appellant's argument that State and private contracts are treated differently supported by *Perry* v. *United States,* 294 U.S. 330 (1934), as the Court's rejection of the very same argument in *El Paso* v. *Simmons* indicates.[49] In *Perry,* Chief Justice Hughes opined that the United States could not alter the gold clauses in its own contracts. First, his opinion, joined by only three other Justices, is not properly characterized as an opinion of the Court on the very point disputed by Justice Stone, the fifth Justice concurring in the judgment. More importantly, the case has nothing to do with State police powers: appellant to the contrary notwithstanding, A.B. 54, there is no general federal police power.

The federal government is limited to the necessary and proper use of its delegated powers. The power to regulate the value of money and determine the value of currency, Chief Justice Hughes stated, did not include the power to repudiate obligations. His conclusion on that point was buttressed by a specific constitutional provision, the fourth

49. Mr. Justice Black urged the distinction in his dissent. 379 U.S. at 528.

section of the 14th amendment, which states that "the validity of the public debt of the United States, authorized by law . . . shall not be questioned." 294 U.S. at 354.

Finally, the Court rejected Perry's challenge to government action, for even if his contract was breached, he could show no damage, and this was the only ground on which a majority of the Court agreed.

B. Bondholders Could Not Reasonably Have Assumed That the 1962 Covenant Was Immune From Action Pursuant to the Police Power.

The covenant did not state that it was immune from the police power and its silence on this point should itself be dispositive. *See Proprietors of the Charles River Bridge Co.* v. *Proprietors of the Warren Bridge Co.,* 36 U.S. (11 Pet.) 420 (1837); *Rogers Park Water Co.* v. *Fergus,* 180 U.S. 624 (1901).

By the time of the covenant's enactment in 1962, the Court had left no doubt that "every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power." *Indiana ex rel. Anderson* v. *Brand,* 303 U.S. 95, 108 (1938). A host of prior cases, cited above, establishes that this formulation included public contracts; *Faitoute Iron & Steel Co.* v. *City of Asbury Park,* 316 U.S. 502 (1942), made clear that it extended to municipal bond contracts.

New Jersey law was equally clear. In *Hourigan* v. *North Bergen Township,* 113 N.J.L. 143, 149 (E. & A. 1934), a case involving municipal bonds, New Jersey's highest court declared:

> "It as a well established doctrine that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right

> of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals. While this power is subject to limitations in certain cases, there is a wide discretion on the part of the legislature in determining what is and what is not necessary—a discretion which courts ordinarily will not interfere with."

The applicability of these principles to the covenant itself is obvious. Article VII of the Port Authority Compact permits the States to add to the duties of the Port Authority if and when they choose to do so. All bondholders purchasing bonds knew or should have known of that basic aspect of the Authority's legal structure. See Section 12(a) of the Consolidated Bond Resolution, A 797. Moreover, Senator Farley, on whose Committee Report appellant puts such stress, speaking specifically of the covenant, warned that "one Legislature cannot bind a subsequent Legislature involving policy." See A 88-90.[50]

The leading opinion as of 1962 on the nature of port authority revenue bonds said the same thing. *Opinion of the Justices,* 334 Mass. 271, 136 N.E.2d 223 (1956). The Supreme Judicial Court of Massachusetts, under its procedure for issuing advisory opinions, was asked by the Legislature to review the constitutionality of the proposed Massachusetts Port Authority's enabling act. The court, although it declared the bill constitutional, declared that:

> "the features of [the bill] purporting to grant exclusive privileges as long as any bonds are outstanding would be subject to revocation and amendment by succeeding legislatures.
>
> "The power of revocation is not, however, without limits." 136 N.E.2d 232-233.

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50. Appellant emphasizes that in its 1963 report, the Farley Committee characterized the 1962 covenant as "constitutionally protected." A.B. 12, 18, 75. But that characterization provides an analytic starting point, not an end to the case. All contracts are constitutionally protected; it is the scope of the constitutional protection that appellant fundamentally misunderstands.

Appellant chose the bonds of this Authority, bonds that clearly could be affected by subsequent legislation, as the standard for comparison with the bonds of the Port Authority of New York and New Jersey.

Thus, the covenant was always vulnerable to an exercise of the police power and its vulnerability was apparent from the moment the covenant was conceived. And appellant's chief witness testified that he was aware at all relevant times that under certain circumstances a State may constitutionally abrogate its contracts, and that other pledges had been repudiated. A 950-951, 952.

Appellant's claim that bondholders relied on the covenant is untenable.[51] Even if the Court were disposed to give no weight to the fact that testimony concerning reliance is inevitably self-serving, the claim of reliance is circular in this context. What was allegedly relied on was the continuation of a statute known to be vulnerable to future change if circumstances warranted. When such circumstances eventuate, a claim of reliance obviously cannot block a responsive change. Appellant cannot escape the trial court's holding that:

> "Those who enter into contractual relations with the sovereign, including the bondholders of the Port Authority, are chargeable with the knowledge that it is a sovereign entity with which they are dealing and

51. Although the trial court found that bondholders had relied on the covenant in the sense that it "in some manner furnished security for the bondholders and it protected the diversion of the earnings of the Port Authority into deficit rail mass transit," A 110, he noted that few if any members of the investment community ever analyzed closely the actual effect it had on bondholder security. A 108. Moreover, appellant's chief witness understood neither the covenant, nor the other provisions of the Port Authority resolutions. What was relied on was not specifics but a vague sense that the covenant was necessary, as Mr. Thompson mistakenly put it, to prevent "the possibility of massive deficit operations getting into the Port structure" and "that if the Port Authority were given a white elephant that all of the revenues of the Port operations, operating revenue, would be pooled in order to support that before debt service would be paid." See p. 35 *supra*.

> that 'the reservation of [the] essential attributes of sovereign power' is as much a part of their contract as that which is expressly stated." A 128.[52]

C. Though Municipal Bonds Are Subject to the Police Power, They Are Readily Marketable.

Although the precedents holding all contracts, including those of the State, subject to the police power are indelibly clear, see pp. 65-75, *supra*, appellant, and *amicus* S.I.A. even more hysterically, claim that the consequences of applying this rule will be catastrophic. See, *e.g.*, Amicus Brief 4: "A holding that the repeal legislation is valid would severely limit, if not foreclose, the access of municipal borrowers to the capital market. . . ." The claim is overwhelmingly refuted by the record.[53]

The heart of appellant's contention is the assertion that the municipal bond market could not function if promises underlying bonds are subject to the reasonable exercise of the police power. The short answer is that it has always functioned this way.

The Massachusetts Port Authority experience is telling because it was appellant, not the State, who chose that agency's bonds as a high-quality municipal credit to be used as a standard for comparison. The Massachusetts Port Authority was born with an express judicial declara-

52. In the passage from *Kheel* v. *Port of N.Y. Auth.*, 331 F. Supp. 118, 122 (S.D.N.Y. 1971), *aff'd on other grounds*, 457 F.2d 46 (2d Cir.), *cert. denied*, 409 U.S. 983 (1972), immediately preceding the excerpt quoted at A. B. 14 n.11, Amicus Brief 20, Judge Tyler said that the contention that the covenant's "delegation to the bondholders is irrevocable [is] a highly questionable one, see *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 427-439 (1934), *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, at 712 (concurring opinion of Justice Story (1819))."

53. The Amicus Brief nowhere claims objective damage to bondholders. Its many quotations merely assert that some people were offended by the States' exercise of their police power. *Amicus'* selective quotations from the Moreland Act Commission Report, pp. 14-16, are misleading as the Commission concluded: "[T]he inferences that may be drawn from the 1974 repealer are far from clear. UDC officials have argued that the repealer closed the bond market

(Footnote continued)

tion that the provisions in its enabling act could be altered by subsequent legislation. See *Opinion of the Justices,* p. 75, *supra.*

On two subsequent occasions this reserved power was used and its use sustained over the objection that the changes would disadvantage bondholders. In *Massachusetts Port Authority* v. *Treasurer & Receiver General,* 352 Mass. 755, 227 N.E.2d 902 (1967), the issue was whether it was constitutional to increase the Authority's liability for retirement benefits payable to employees of a project put under Authority management. The court held it was, relying on the police power doctrine:

> "Unquestionably the increase in the prior creditable service of former Mystic employees by the 1960 act will tend to increase to some extent . . . the annual operating expenses of M.P.A. over what they would have been if the 1960 statute had not been enacted. We think, however, that this increase does not effect any substantial or unconstitutional impairment of the security behind M.P.A.'s revenue bonds. The contract underlying these bonds was necessarily made subject to the possibility that subsequent legislation, for proper purposes affecting the public interest, might in some degree affect M.P.A.'s revenues." 227 N.E.2d at 906.

Next, in *Opinion of the Justices,* 313 N.E.2d 882 (Mass., 1974), the court upheld an amendment of the Massachusetts

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(Footnote continued)

to them, yet in September 1974, shortly after the Port Authority covenant had been repealed, UDC was able to sell readily a large issue of moral obligation bonds. HFA too was able to sell moral obligation bonds until 1975. . . ." Report 163.

Amicus relies heavily on a partisan article by a bond attorney and a student. Amicus Brief at 12, 16-17, 19-20. Written before trial, it assumes the validity of the testimony before the Farley Committee that without the covenant the Port Authority "could not sell a single Port Authority bond," 6 *Seton Hall L. Rev.* 48 at 78 (1974), and contains no reference at all to the energy crisis and environmental regulations. The cases discussed in this brief at 74-75, 78-81, 93, show that it is plainly wrong in asserting that "legislative impairment of bondholders' rights because of the economic crisis [*sic*] has been permitted only when any other result would lead to total fiscal collapse of the bond issuer and the impossibility of payment of the bonds." Amicus Brief 20.

Port Authority enabling statute changing the provisions that all property held by the Authority or its lessees was immune from local property taxes. The Court realized that the change might have a "substantial impact on the Authority's revenues." Nonetheless it held that "the essential obligations of the bondholders' contract, i.e., that the Authority make timely payment of the interest on and principal of the bonds would be unaffected." 313 N.E.2d at 887.

Despite this history of change and continuing vulnerability to change, Massachusetts Port Authority bonds are held in high regard by the investment community.

The reactions of Moody's, Standard and Poor's, and Barr Brothers to repeal, see pp. 37-40, *supra,* leave no doubt that the bonds of the Port Authority of New York and New Jersey also continue to be an attractive investment though, like all contracts, they remain subject to the State's police power.

Nor is this surprising. The Constitution and the courts assure that the police power will not be exercised capriciously. Affirmance here does not mean that the States can do anything they choose. While this Court has had few contract clause cases in recent years, the impairment prohibition has been invoked more frequently in the State and lower federal courts. They have found adequate guidelines in *Blaisdell* and *El Paso* for weighing State interests against private expectations. In fact, the courts of New Jersey and New York have each rejected legislation having the most trivial impact on bondholders precisely because no paramount State interests were involved. *New Jersey Highway Auth.* v. *Sills,* 111 N.J. Super. 313 (Ch. Div. 1970), ***aff'd,*** 58 N.J. 432 (1971), invalidated legislation that entitled members of the National Guard going to or from duty to drive on the New Jersey Turnpike toll free. A clearer example of *de minimis* effect on bondholders can hardly be imagined. It was still deemed improper under the contract clause. *Patterson* v. *Carey,* App. Div.2d , 383 N.Y.S.2d

414 (3d Dep't 1976), struck down legislation mandating a rollback of a toll increase for lack of a sufficient police power justification.

The continuing need of States for borrowed capital imposes additional constraints upon State legislation threatening a State's own or its agencies' obligations. Appellant's and *amicus'* theory—that the State can be trusted to maintain a benevolent neutrality when mediating conflicting private interests, but is surely greedy when dealing with its own—has the political truth backwards. In many private disputes, one side has far more political power than the other: there are, for example, many more tenants than landlords. And that political power has been known to affect legislative impartiality. But the heavy balance of pressure is the other way when the State wishes to borrow money. Nobody has to lend to the State; and yet its affairs cannot be managed unless many do. As a consequence, investors and their representatives have enormous political influence. *Amicus'* members have sold billions of dollars of so-called moral obligation bonds, bonds which are not even legally binding obligations of the States, only because they, and investors, realize this underlying reality.

In *N. J. Sports & Exposition Auth.* v. *McCrane,* 61 N.J. 1, *appeal dismissed,* 409 U.S. 943 (1972), the court upheld the constitutionality of the legislation establishing the Sports Authority. In separate opinions, Chief Justice Weintraub and two of his colleagues expressly stated that the State could abolish or curtail horse racing, though revenues from that activity were the Authority's primary means of paying its bonds. 61 N.J. at 37-39, 58. The four-member majority of the court believed the question "hypothetical" and not properly before the court. 61 N.J. at 28. The majority agreed, however, that bond covenants were subject to "a proper exercise of the State's never abdicated police powers." 61 N.J. at 26. If the protestations of appellant and *amicus* had any substance, the Sports Authority bonds should not have been marketable. Yet the

bonds were sold in January 1974, just as the Port Authority's 42nd series was sold after the decisions below, A 1123-1124.

The bond market does not need unique immunity from the police power. To confer it would be to grant sophisticated investors seeking a tax-free return a certitude in arranging their affairs denied to everyone else.

D. The 1974 Repeal Legislation Constituted an Exercise of the States' Police Power.

The repeal of the covenant was obviously an exercise of the police power of the States. As shown in the Counter-Statement of the Case, pp. 56-59, *supra,* repeal had been considered on three prior occasions in the immediate past. It moved forward swiftly in 1974 because of an energy crisis that was an everyday reality to anyone who needed gasoline for an automobile. Federal orders that would restrict use of automobiles to reduce pollution hung over the State. Even appellant's chief witness, in a letter written to *The New York Times* the day after Governor Bryne signed the repeal, characterized government efforts to improve mass transit as a proper use of State police power. A 246.

Thus, appellant's assertion that the crises in mass transit, energy and pollution were just a matter of coincidence is unfounded.

Appellant's complaint comes down to the proposition that the 1974 law contained no findings of fact or declarations of emergency. Yet no authority of this Court holds that such findings or declarations are constitutionally required. In *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398 (1934), the Minnesota Supreme Court had supplemented the legislative findings with its own findings concerning economic conditions in the State, noting that "Courts must be guided by what is common knowledge." See 290 U.S. at 422-423. Chief Justice Hughes' opinion relied upon the Minnesota Attorney General's oral argument expounding the conditions that had prompted the mortgage moratorium.

Similarly, in *El Paso* v. *Simmons*, 379 U.S. 497 (1965), this Court relied on books and land office records in describing Texas' experience with its land policy, and the record was silent as to what, if anything, had been said in the legislature. See also *Butchers Union Co.* v. *Crescent City Co., supra,* 111 U.S. 746 (1884).

The courts below properly declined to declare that the Constitution requires the Legislature to garnish its enactments with ritual recitals of what everyone knows and appellant concedes—that improving mass transit is responsive to vital energy and environmental needs. New Jersey too follows the rule that the "courts must be guided by what is common knowledge." *Bucsi* v. *Longworth Building & Loan Ass'n,* 119 N.J.L. 120, 122 (E. & A. 1937), *appeal dismissed,* 305 U.S. 665 (1938).

This Court's precedents also reject the contention that use of the police power must be based on emergencies or declarations thereof. In *Gelfert* v. *National City Bank,* 313 U.S. 221 (1941), the Court reviewed the constitutionality under the contract clause of a New York statute that drastically diminished the protection enjoyed by mortgagees. Under the statutes applicable when the mortgage was made, the mortgagee was entitled to a deficiency judgment for the short-fall between the price received for the property and the amount owed. The new statute authorized a court to set a "fair and reasonable value on the property" different from that for which it in fact sold.

The challenged statute, Chapter 510 of the Laws of New York, 1938, included neither legislative findings nor a declaration of emergency. The New York Court of Appeals held it unconstitutional because it was "not addressed to a declared public emergency," and was "not designed for the relief of urgent public needs," 313 U.S. at 230. Despite this deprecating characterization by the highest State court concerning the product of its own Legislature, this Court reversed the decision, holding:

> "The fact that an emergency was not declared to exist when this statute was passed does not bring within the protective scope of the contract clause rights which were denied such protection in *Honeyman* v. *Jacobs.*" 313 U.S. at 235.[54]

Veix v. *Sixth Ward Building & Loan Ass'n of Newark,* 310 U.S. 32 (1940), also rejected the argument that a declared emergency is necessary to legislative action under the police power. The statute under attack in *Veix* permanently modified the contractual right of depositors to withdraw their money from savings and loan associations; the statute contained no declaration of emergency. After stating that "all contracts are made subject to the [State's] paramount authority," 310 U.S. at 38, the Court responded to appellant's contention that *Blaisdell* was limited to emergency legislation of a temporary character:

> "The cases [including *Blaisdell*] cited in the preceding paragraph make repeated reference to the emergency existing at the time of enactment of the questioned statutes. Many of the enactments were temporary in character. We are here considering a permanent piece of legislation. So far as the contract clause is concerned, is this significant? We think not." 310 U.S. at 39.[55]

E. Repeal Constituted a Reasonable Exercise of the States' Police Power.

1. *The Blaisdell case*

Home Building & Loan Ass'n v. *Blaisdell,* 290 U.S. 398 (1934), is the starting point of modern contract clause

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54. *Gelfert* totally repudiates appellant's arguments, A.B. 63-64, that the decision in this case should turn on whether the repeal is temporary or long-lasting—a distinction appellant urges on the ground that *Bronson* v. *Kinzie,* 42 U.S. (1 How.) 311 (1843), is controlling. *Gelfert* effectively overruled *Bronson,* noting it had by *Blaisdell,* "been confined to the special circumstances there involved . . . . We cannot permit the broad language those early decisions employed to force legislatures to be blind to the lessons which another century has taught." 313 U.S. at 235.

55. If the existence of an emergency were significant, New Jersey's energy crisis and public health problems would clearly qualify.

analysis. As the Court observed in *East New York Savings Bank* v. *Hahn,* 326 U.S. 230, 231-232 (1945):

> "The comprehensive opinion of Mr. Chief Justice Hughes in that case cut beneath the skin of words to the core of meaning. After a full review of the whole course of decisions expounding the Contract Clause—covering almost the life of this Court—the Chief Justice, drawing on the early insight of Mr. Justice Johnson in *Ogden* v. *Saunders,* 12 Wheat. 213, 286, as reinforced by later decisions cast in more modern terms, e.g., *Manigault* v. *Springs,* 199 U.S. 473, 480; *Marcus Brown Co.* v. *Feldman,* 256 U.S. 170, 198, put the Clause in its proper perspective in our constitutional framework."

Blaisdell declared that the validity of a contract modification turns on "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end," 290 U.S. at 438, repeated in *El Paso* v. *Simmons,* 379 U.S. 497, 507 n.9 (1965). The search is for "a rational compromise between individual rights and public welfare." 290 U.S. at 442.

The central question asks whether a valid public interest is being served. Thus, legislation may not simply extinguish contract rights because it is inconvenient to pay them. *Lynch* v. *United States,* 292 U.S. 571 (1934). *Compare Veix* v. *Sixth Ward Building & Loan Ass'n of Newark, supra,* (public interest, law upheld), *with Treigle* v. *Acme Homestead Ass'n,* 297 U.S. 189 (1936) (similar law, but found to have been "directed merely toward a private right and not deemed in the public interest." 310 U.S. at 41). *Cf. New Jersey Highway Auth.* v. *Sills,* 111 N.J. Super. 313, 320 (Ch. Div. 1970), *aff'd,* 58 N.J. 432 (1971) (law invalid where primary objective "conferring of personal benefit upon Guardsmen and reservists" rather than "any

problem of state-wide importance" as in *El Paso*). In addition, the legislation must not reveal a "studied indifference" to the interests of persons seeking to enforce contractual obligations. *W. B. Worthen Co.* v. *Kavanaugh,* 295 U.S. 56 (1935).

While appellant tries at length to read error into the trial court's discussion of *Worthen* v. *Kavanaugh, supra,* A.B. 58-59, that court's treatment is perfectly consistent with this Court's analysis in *Faitoute Iron & Steel Co.* v. *City of Asbury Park,* 316 U.S. 502, 515 (1942), where the Court inquired whether the legislature had been guilty of "studied indifference" to private interests.

Thus, contrary to appellant's analysis, *El Paso* v. *Simmons,* which provides the most recent expression of the standards controlling this case, did not set forth contract clause principles applicable only to the most aberrant of settings. It was part and parcel of a continuing search for a fair accommodation between two principles that frequently clash—contract rights are constitutionally entitled to respect, and the States must retain their sovereign power to protect their people.

2. *The El Paso case*

Texas provided for the sale of public lands on very easy credit terms when it was raising money for school funds and seeking to encourage settlement. The statutes governing these sales provided that one who forfeited the land back to the State for non-payment of interest had an unlimited time in which to reinstate his rights by payment of back interest, subject to the vesting of rights in third persons. In 1941, after a history of land title disputes and rampant speculation in such lands, Texas limited the right of reinstatement to five years. Simmons was the owner of a deed to land contracted for in 1910, for which the

timely payment of back interest had not been made. He challenged the constitutionality of the 1941 law after Texas transferred the property to the City of El Paso in 1957.

Despite the dissent of Justice Black, who urged retention of formal categories of impairment analysis in preference to standards of reasonablness, all the other Justices took the contrary view. The Court held squarely that "it is not every modification of a contractual promise that impairs the obligation of contract under federal law." 379 U.S. at 506-507. Quoting extensively from Chief Justice Hughes' opinion in *Home Building & Loan Ass'n* v. *Blaisdell, supra,* Justice White wrote this key passage, 379 U.S. at 508-509:

> "The decisions 'put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula,' as Chief Justice Hughes said in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U.S. 398. The Blaisdell opinion, which amounted to a comprehensive restatement of the principles underlying the application of the Contract Clause, makes it quite clear that '[n]ot only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." *Stephenson* v. *Binford,* 287 U.S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. . . . This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.' 290 U.S. at 434. Moreover, the

> 'economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.' *Id.,* 290 U.S. at 437. The State has the 'sovereign right . . . to protect the . . . general welfare of the people. . . . Once we are in this domain of the reserve power of a State we must respect the "wide discretion on the part of the legislature in determining what is and what is not necessary."' *East New York Savings Bank* v. *Hahn,* 326 U.S. 230, 232-233. As Mr. Justice Johnson said in *Ogden* v. *Saunders,* '[i]t is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts.' 12 Wheat. 213, 6 L.Ed. 606, 633.
>
> "Of course, the power of a state to modify or affect the obligation of contract is not without limit. '[W]hatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.' *Blaisdell, supra,* 290 U.S. at 439."

As the last sentence quoted makes clear, the State may not have a policy of repudiating debts, destroying contracts or denying the means to enforce them. In specific instances, however, it may modify contracts where the end is legitimate and the measures taken are reasonable. And in determining whether the measures are reasonable, the legislature has "wide discretion."

The Court proceeded to apply these principles, revealing once again that a considerable loss may constitutionally be inflicted on a party contracting with the State, in further-

ance of governmental ends far less important than those New Jersey was serving here. The Court decided that the Texas law modifying plaintiff's contract served a "vital interest" by promising to disentagle some land titles. 379 U.S. at 515. Obviously, neglect of this interest would not have led to governmental collapse.

The contractual interest impaired, the Court said, was not the seller's "central undertaking" nor the "primary consideration" for the purchaser's undertaking, nor was it the "substantial inducement" to enter the contract. 379 U.S. at 514. This was not, of course, to say that the contractual interest impaired was trivial—its loss cost Simmons title to land he could have owned if the contract were carried out. Though not the "substantial inducement," Simmons' interest was plainly substantial, as indeed were the interests of other parties that have alleged contract impairment, such as people denied money then owed to them. *E.g., Albigese* v. *City of Jersey City,* 127 N.J. Super. 101, 112-113 (Law Div.), *aff'd,* 129 N.J. Super. 567 (App. Div. 1974); *California Teachers Ass'n* v. *Newport Mesa Unified School District,* 333 F. Supp. 436 (C.D. Cal. 1971); *Michigan Transp. Co.* v. *Secretary of State,* 41 Mich. App. 654, 201 N.W. 2d 83 (1972), *leave to appeal denied,* 389 Mich. 767 (1973). Unlike appellant, which has suffered no loss at all, those litigants were seriously damaged.[56]

56. Appellant attempts to sever *El Paso* from its legal background by isolating a series of factors. A.B. 70-78. One searches *El Paso* in vain for any indication that the eight Justices who joined that opinion regarded it as a "narrow exception," A.B. 70, carved out of otherwise firm rules. Nonetheless, appellant reads *El Paso* not as a broad exposition of the police power doctrine but rather as having erected a series of barriers to State action. The approach is wrong. As was indicated above, the applicable principle is that a State may modify a contract when "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." The factors emphasized by appellant were the elements present in that particular case that made it reasonable for the State to take Simmons' land without paying.

(Footnote continued)

3. *Appellant's claim that the price purchasers were willing to pay for bonds was affected by the covenant is unsupported by the record and immaterial as a matter of law.*

Appellant places great weight on its claim that, supposedly unlike *El Paso,* purchasers were so interested in the covenant that it affected the price they were willing to pay for bonds. The claim is defective in two respects: the record does not support the factual premise on which it rests; and, even if it did, the claim is immaterial as a matter of law.

The weight of the evidence is overwhelmingly against the proposition that the covenant and its repeal ever affected bond prices or interest rates, save for the short-term fall-off to be discussed presently. The record shows that Port

(*Footnote continued*)

In any event, appellant's distinctions are ill-taken. First, *El Paso* does not say that the five-year limit was the only way to solve the problem; the State could have taken the contingent interest by eminent domain. The Court merely indicated at the pages cited, 379 U.S. at 512-513, that less drastic measures had proved unworkable, precisely the situation here where efforts begun in 1970 to involve the Port Authority in expanded rail mass transit had been stymied. Second, the covenant was not a primary inducement to purchase of Authority bonds; the trial court found few if any investors knew what it did. By contrast, in *El Paso,* it was precisely because purchasers knew of and relied upon the reinstatment possibility that land prices soared. Third, appellant says that buyers could not have relied too heavily on reinstatement in *El Paso* because the right was defeasible, though not in the way the State sought to defeat. Here, too, the covenant provides no security that cannot be taken away because, among other things, it leaves the States free to assign a whole range of deficit-generating activities—*e.g.,* habor waste disposal—to the Port Authority. Fourth, as the trial court found, there have been substantial changes since 1962, both in the Authority's financial picture and in the impact of the energy and environmental crises. Fifth, the covenant does impose a difficult burden upon the State. The reasonableness of its repeal is enhanced because, unlike *El Paso,* where buyers were advantaged by reinstatement, bond investors are not advantaged by the covenant and not harmed by repeal. In fact, their security has been enhanced by increasing the flow of funds against which they have a first lien.

Authority bond prices and interest rates were unaffected in January 1962, even though a rail mass transit law was on the books in one State and related legislation was pending in the other. See page 41, *supra*. In 1972, New York repealed the covenant, an action that is not claimed to have affected bond prices.

The 1973 prospective repeal of the Covenant is likewise not claimed to have had any effect on Port Authority bond prices. Here appellant's explanation is that purchasers —faced with an official statement that the covenant did not apply—were confident that the covenant would nonetheless be continued until 2007. A.B. 24-25. This claim is inconsistent with appellant's assertion, *e.g.*, A.B. 14, that further mass transit could be accomplished by a compromise with holders of covenant-protected bonds.

Next, bond prices were unaffected by the pendency of repeal legislation in both States in 1974. A 210-211, 213-214. Appellant offers no explanation for this.

Finally, since repeal in 1974, the prices at which Port Authority bonds trade in the secondary market have not been affected, save for a short-term decline from which the bonds recovered long ago. At points, appellant seems to argue that this short-term drop is to be treated as the damage its case otherwise so desperately lacks. However, for those who sold during the fall-off, A.B. 40n. 24, invalidation of repeal would do no good; and for those who held on, there is no damage. Moreover, if there was damage, appellant caused it: on the very day New Jersey repealed the covenant, appellant held a news conference in which it announced the filing of this suit, characterized the repeal of the covenant as a severe blow to bondholders, and declared that it would no longer buy Port Authority bonds. See A 44-45. The wire services carried the story. This was the trustee and largest holder of Port Authority bonds

speaking. A course of conduct surer to drive down bond prices, and obscure a true market reaction, can hardly be imagined.

Thus, the only evidence suggesting that the covenant affected bond prices is the hypothetical testimony of appellant's witnesses as to what they would have done on a state of facts that never existed, and that never could have existed.

Their opinion of the covenant's importance rested not on its merits, for they did not understand it, but on what they had been told about it by Authority spokesmen. Thus, the hypothesis on which they opined that they would have sought a better price included not only the premise that there was no covenant but also the premise that Port Authority spokesmen were advising them that the covenant was vital to their interests and that the bonds could not be sold without it. And this was explicity made a part of the hypothesis on which Mr. Thompson's opinion was given. A 858. The Port Authority's behavior since repeal, and its evident self-interest at all times, demonstrate that the Port Authority would not have damned its own bonds merely because they lacked the 1962 covenant. (The Port Authority's rhetoric in 1962 was part of its effort to obtain the covenant.) When one of the premises of a hypothetical question is unsupported by evidence in the record, the witness' answer is, of course, to be disregarded as irrelevant. In any event, the evidence of what actually happened to Port Authority bond prices refutes the witnesses' unsupported speculations.[57]

The precedents are clear that even if those speculations were taken as true, they would not make unreasonable an otherwise permitted exercise of the reserved powers of sov-

57. No judicial opinion applying the *El Paso* standards has ever given weight to the testimony of a contracting party that he really cared about what was taken away. Courts invariably analyze the abrogated provisions on an objective basis.

ereignty. In *Butchers Union Co.* v. *Crescent City Co.*, 111 U.S. 746 (1884), the Court noted that the slaughterhouse monopoly had spent substantial sums in reliance upon its grant from the State. Repeal of the monopoly was upheld. Similarly, in *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U.S. 502 (1942), the purchasers of municipal bonds unquestionably relied on the interest and maturity dates in their bonds, and the remedies for enforcing them, and obviously would not have paid the same price for the bonds without those features. Nonetheless, the changes were upheld. In *El Paso* itself, purchasers of installment contracts were using their reinstatement possibilities as a mechanism for speculating on subsequent discovery of minerals. They would not have purchased and paid the inflated prices the contracts commanded but for those possibilities.[58] The general point is worth stating: it will often be true that subsequent legislation modifying some aspect of a contract would have affected the initial bargain had the legislation been anticipated. To make such effect dispositive would emasculate the police power.

4. *Repeal deprived bondholders of an interest of little or no value to further ends of large importance.*

a. *The bondholders' interest.* Bondholders contracted to receive periodic payments of interest, and repayment of principal when due. That is the performance owed them,

58. As Mr. Justice White observed:

> "Hence the land Commissioner noted that the majority of sales and resale . . . were to purchasers buying a 'speculative option,' 'taken for possible profits on the rights of the surface owners to lease the land for oil and gas.' 'Under such conditions lands were bid in at highly inflated prices such as no one who expected to keep the land could afford to offer.' " 379 U.S. at 512.

One can only imagine the statute's catastrophic effect on the "secondary market" for such contracts.

and neither the States nor the Port Authority have in any way questioned that duty. Thus, unlike the great majority of contract impairment cases where wage increases are cancelled,[59] rents rolled back,[60] future interests wiped out,[61] or statutory restrictions on liquidity imposed,[62] nothing of the performance contracted for has been withheld here.

Undoubtedly, the obligation to repay principal and pay interest is the "central undertaking" for purposes of *El Paso* analysis. That was what the court deemed the primary obligation of bonds in *Beaumont* v. *Faubus*, 239 Ark. 801, 394 S.W.2d 478 (1965). In *Jacksonville Port Auth.* v. *State*, 161 So.2d 825, 827 (Fla. 1964), the court held that "[t]he right of a bondholder is to have his principal and interest paid when due; and it should be of little interest to him from what fund his obligation is currently being paid so long as he is being paid from some source sufficient to discharge what is his due." See also *New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard & Nantucket S.S. Auth.*, 336 Mass. 651, 148 N.E.2d 637, *appeal dismissed for want of substantial federal question*, 358 U.S. 53 (1958); *Opinion of the Justices*, 313 N.E.2d 882 (Mass. 1974). All of these cases upheld

59. *California Teachers Ass'n* v. *Newport Mesa Unified School Dist.*, 333 F. Supp. 436 (C.D. Cal. 1971).

60. *Albigese* v. *Jersey City*, 127 N.J. Super. 101 (Law Div.), *aff'd*, 129 N.J. Super. 567 (App. Div. 1974).

61. *Huddleston* v. *Nebraska Jewish Educ. Society*, 186 N.W. 2d 904 (Neb. 1971).

62. *Veix* v. *Sixth Ward Bldg. & Loan Ass'n of Newark*, 310 U.S. 32 (1940). One disposed to ignore the record and accept appellant's claim of damage at face value could still conclude at most that repeal caused a decline in price in the secondary market and a "thinness" in that market. Since timely payment of interest and principal are not claimed to be in jeopardy, appellant is, in effect, claiming only a loss in liquidity. The Court has frequently permitted States to impose such a loss in pursuit of permissible ends. *E.g.*, *Faitoute Iron & Steel Co.* v. *City of Asbury Park, supra; Home Bldg. & Loan Ass'n* v. *Blaisdell, supra; Veix, supra.*

challenged legislation, treating the primary duty of payment as different from the permissibility of particular expenditures.[63]

Indeed, the Port Authority's Consolidated Bond Resolution itself makes clear what is primary and what is secondary. Under Section 16 of the Resolution, A 802, the obligation of the Port Authority is absolute and unconditional only with respect to payment of principal and interest.

Did repeal of the covenant materially affect the probability that the Port Authority's bonds would be paid? The answer is no, and appellant has never alleged or offered to prove otherwise. The covenant does not provide "security" in the classic sense of a lien on a particular piece of property that can be sold in the event a debt is not repaid; the covenant does not effect a pledge of particular funds, whether now in hand or after acquired; the covenant does not even assure that the Port Authority's net revenues will be higher with it than without it.

It simply is not true that the consequence of upholding the covenant is that the sum of money available to pay bonds will be greater than if the covenant is repealed. The linkage of repeal to toll increases for mass transit support has increased the total sums available for repayment of bonds. Moreover, even with the covenant the States could have required the Port Authority to run whatever deficit facilities other than passenger railroads the Commissioners could certify under the 1.3 and Section 7 tests. Deficit operations ranging from the Staten Island ferries and all

63. In *Ruano* v. *Spellman*, 81 Wash. 2d 820, 505 P.2d 447 (1973), which appellant cites at A.B. 54, the legislation called into question the legality of performing the primary duty of repaying the bonds as scheduled and no exercise of the police power was involved. Similarly, *First Nat'l. Bank* v. *Maine Turnpike Auth.*, 156 Me. 131 (1957), also cited at A.B. 54, involved no exercise of the police power—the legislation attempted to confer private benefits by making the Authority pay utility costs.

bus lines in the area to handling harbor waste disposal fall within the scope of the Port Authority Compact given the Compact's allowance for additional duties. These duties could be assigned to the Port Authority and the public tax money now spent on them applied to railroad purposes. It makes no difference to bondholders whether money goes to buses or trains—but the covenant applied only to the latter.

b. *The public ends.* On the other side of the balance, the interests of the States are of a character and intensity far surpassing any presented in the *Blaisdell-El Paso* line of cases. Even in *El Paso,* the principal harm to the State from its ill-advised land policy was that it had contracted itself into a mess and sold its lands too cheaply when it wanted to encourage settlement. The "imbroglio" over land titles could obviously have been solved without resort to breach of contract.

In this case, the States' interests are those core problems of health and public safety that led the courts to develop the police power exception to impairment doctrine. They are "fundamental interests" falling well within the meaning of the principle that, "[T]he Court has sought to prevent the perversion of the [contract] clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests," *Home Building & Loan Ass'n* v. *Blaisdell, supra,* 290 U.S. at 443-444.

In the fourteen years since the covenant's enactment, it has become clear that the fumes that emanate from motor vehicles are a deadly danger. They have left the air in the region so polluted that it is far below the minima required to protect the public health. 42 U.S.C. section 1857C-4(b)(1). The import of that finding cannot be stressed too strongly. People's life expectancy and physical well-being are being affected by the transit problems to which the Port Authority's bridges and tunnels have so heavily contributed. Indeed, the State has been subjected to federal

pressure and plans, which would, in effect, shut down the northern part of the State because of its inability to bring pollution levels down to the level required to protect the public health.

The State has openly opposed such plans. A 567. That opposition reflects a dreadful reality. At some point even serious encroachments on the health of our citizens must be tolerated if the alternative is outright economic collapse. But the State is surely privileged to see to it that the alternatives are not put that way. If government is not organized for carrying out purposes of that magnitude, then we do not know what it is organized for.

Moreover, as was seen just two years ago and may be seen again, the State can be thrown into total havoc at any time by the actions of foreign oil suppliers. It is not hyperbole to claim that conserving this precious resource, and providing for alternatives if its flow is shut off or its expense made prohibitive, is a matter of political survival. It should not be forgotten that the oil embargo led to near-violent confrontations over access to gasoline in New Jersey, and outright gun battles over truck fuel allocations in other States.

One may argue about the gravity of our energy and environmental difficulties. But reasonable people may surely believe that they should be attended to, and that is the test governing the Court. When physical, political or economic survival is at stake, the power of the Legislature is at its zenith.

c. *The insufficiency of other means.* Appellant suggests that the States should pursue their fundamental interests without repeal because the covenant itself permits increased Port Authority participation in rail mass transit. A.B. 14. As a legal matter, this judgment about means is

precisely the sort that is within the wide ambit of legislative discretion. But appellant's argument should be analyzed on its merits. At A.B. 14, it says:

> "[T]he Covenant by its terms permits Port Authority construction of rail facilities on its bridges; it permits Port Authority involvement in freight rail facilities; it permits any mass transit involvement of the agency of which bondholders approve; it permits the agency to undertake passenger rail mass transit operations which, by federal or state financial assistance or otherwise, together with user charges, can be made self-supporting within the meaning of the Covenant."

Appellant goes on to claim that the States' rail mass transit plans could have been accomplished if the Authority "had been permitted by the States to raise PATH fares to competitive levels." Appellant concludes:

> "no one disputes that anything which the States wish to accomplish through repeal of the Covenant can *to the same extent* be accomplished within the Covenant if either of the States are willing, through direct subsidies, guarantees or otherwise, to stand behind the necessary financing." A.B. 14; emphasis added.

The argument shows the weakness of appellant's case. To build a passenger railroad that began at one end of the George Washington Bridge and ended at the other would be a very expensive joke: the covenant would prevent it from going any further. That the covenant "permits Port Authority involvement in freight rail facilities" is undisputed and irrelevant; the covenant does not permit further involvement in passenger rail facilities, which is what this case is about. Obtaining bondholder approval would be impossibly burdensome: appellant's counsel has sworn that the owners of more than 95 percent of the Authority's Consolidated Bonds are "unknown to the Port Authority or its

paying agents." A 54. And appellant's chief witness, Mr. Thompson, concluded that an approach to bondholders for their consent "would fail." A 192.

Appellant's suggestion that a self-supporting rail mass transit facility be established ignores the facts that even in 1972 PATH-Plainfield was "barely doable" on a self-supporting basis, A 708-709, and that its costs have escalated sharply since then. Because of its capital requirements, the project will not be "self-supporting" within the meaning of the covenant even though the State has agreed to assume its operating deficits. See A 477, 527.

Nor would raising the fare "to competitive levels" help. Appellant presumably regards the competitive level as a dollar for a one-way trip, since it notes that AMTRAK and Conrail charge that fare for a ride from Newark to Manhattan, A.B. 16 n.12, even though neither AMTRAK nor Conrail is a rapid transit facility like PATH. More importantly, even if the basic PATH fare were increased to a dollar per ride, the revenues would still be insufficient to permit the financing of PATH-Plainfield within the covenant. Statistics derived from Volume I of the Joint Appendix below, pp. 255-70, 73 and 74, indicate that the PATH fare would, at the very least, have to be *quadrupled* to $1.20 per ride, *with no loss of passengers,* to enable the Authority to spend the $12 million per year required for debt service on PATH-Plainfield alone.[64]

Finally, appellant claims that "no one disputes" that anything repeal can do the States can do "to the same extent" by putting up their own money. The claim has two glaring defects. First, the State has, of course, disputed this claim repeatedly and emphatically, and both courts below have agreed with the State. Second, the claim itself is equally defective. Repeal of the covenant has made possible impo-

64. As long as the covenant remained in effect, to raise the PATH fares to any level that would retain ridership would simply have added to the Authority's ample reserves.

sition of a 50 percent increase in vehicular tolls to finance mass transit projects and increase the Port Authority's reserves. The States themselves could not have imposed that toll increase, with its auto-inhibiting potential.[65] Nor, in all probability, could the Port Authority have imposed it without applying the surplus revenues to mass transit.

Thus, repeal permits a balanced, comprehensive approach to the States' transportation, air quality and energy goals, an approach that is not available "to the same extent" without repeal.

It is worth emphasizing that the plan to be implemented as a result of repeal differs from that publicly and privately urged by appellant's chief witness, Mr. Thompson, A 189, 246, only in offering greater protection to bondholders.[66] The plan would, however, have been impossible under Mr. Tobin's interpretation of the 1962 covenant, A 689, for the simple, but indefensible, reason that it precluded any application of Port Authority vehicular tolls, even increased tolls, to any new rail mass transit project that did not cover all of its operating expenses and debt service. The repeal allows more rational and flexible financing, including the increased vehicular tolls, reasonable appropriations and subsidies by the federal government, the States and the Port Authority, appropriate charges to the users of rail mass transit facilities and enhanced security for bondholders.

Appellant also argues, A. B. 73, that the States can achieve their ends without involving the great revenue-producing facilities they helped the Port Authority finance. See pp. 5-6, *supra*. Yet the Port Authority was established because responsible leaders saw then the truth of a

65. See N.J.S.A. 32:1-35.55(a).

66. Under Mr. Thompson's plan, the States would have collected the increased tolls while under the plan to be implemented that money goes to the Authority.

proposition that is equally true now: if a project's realization depends upon the ability to achieve political agreement among a host of competing interests in two different States, it cannot be done. For example, should New Jersey pay the full cost of the PATH extension when one of its principal beneficiaries will be New York City? Faced as it is with declining employment due to industry relocation motivated in part by transportation inadequacies, should the City not pay its share? What about the City of Elizabeth? Should it not pay extra for the new service? Perhaps New York State should pay as it taxes the income earned in that State by New Jersey commuters.

To come at the question another way, is it fair to ask a citizen of southern New Jersey to increase the tax support he already provides for State mass transit subsidies in the Port District? In his region, bridge tolls have to be set to provide adequate protection for bondholders and support mass transit; and surplus revenues are in fact used for a rapid transit system. See page 53, n.35, *supra*, A 725-726. If his region can manage its affairs, why can't the Port District with the huge surpluses generated by its bridges and tunnels?

The Port District is not a State. The interests of its residents are not coincident with those of voters residing outside its boundaries. Yet appellant's alternative to repeal depends on those voters—in two different States—accepting the following package: we will pay increased taxes to finance those parts of your transportation system that lose money; after you have made ample provision for the protection of bondholders, you may take the surplus revenue from the parts of your transportation system that make money and do whatever you like with it, provided only that you do not use it to lighten our tax burden by supporting a passenger railroad. Appellant's alternative is neither realistic nor fair.

The Port Authority was created to bridge the provincial interests that had prevented efficient utilization of the port. The covenant subverted that objective. It did little or nothing for bondholder security, yet it prevented both the States and the Port Authority from charging the *region's* drivers to fund the *region's* mass transit needs.

The States made a two-fold judgment: (1) the problems to which repeal of the covenant was addressed far outweighed the utterly hypothetical damage done to bondholders; and (2) repeal of the covenant would materially aid in the solution of those problems. That legislative judgment is entitled to maximum respect.

II

REPEAL OF THE 1962 COVENANT DID NOT CONSTITUTE A TAKING OF PROPERTY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Private property may not be "taken" without payment of compensation. *Chicago, B. & Q. R. R.* v. *Chicago,* 166 U.S. 226, 241 (1897). But there has been no prohibited taking here. Just as the development of the police power doctrine has limited contract rights, so too has that same police power been held to limit property rights. Unquestionably, the State may, by a proper exercise of the police power, regulate property interests so as to reduce their value, or indeed destroy them. *Mugler* v. *Kansas,* 123 U.S. 623 (1887); *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Miller* v. *Schoene,* 276 U.S. 277 (1928); *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962).

The tests to be used in deciding such issues involve the same balancing of public need and private interest that characterizes the modern contract clause cases. It is precisely the tendency to "coalesce" the two standards—to

afford contract rights the same, but no more, constitutional protection than property rights generally, that has marked the modern law on the subject. Hale, *The Supreme Court and the Contract Clause,* 57 Harv. L. Rev. 852, 980 (1944); see *Veix* v. *Sixth Ward Building & Loan Ass'n,* 310 U.S. 32, 41 (1940); *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 447-448 (1934).

Appellant's due process claim is thus untenable if the State's position on the reasonableness of the repeal under contract clause standards is accepted. The "property" right at issue, if appellant's interest is so characterized, has no existence apart from the contract whose permissible alteration is assumed. Appellant's brief argues by reliance upon Justice Black's lone dissent in *El Paso* (as if the other eight Justices did not decide to the contrary), and a student note expressing concern that *El Paso* permitted the State to obtain title to valuable land as a result of its repudiation of its agreement. The claim is baseless.

III

THE 1962 COVENANT WAS VOIDABLE UNDER THE INTERSTATE COMPACT CLAUSE.

The foundation of appellant's case is the hypothesis that the 1962 legislation created a binding contract. That foundation is faulty. The covenant has been voidable from its inception.[67]

67. The question whether an enforceable contract exists would seem logically to precede the question whether the alleged contract has been unconstitutionally impaired. Although the State raised both issues below, neither the trial court nor the Supreme Court of New Jersey chose to address them in this order. Having resolved the impairment question in favor of the State, they found it unnecessary to decide whether an enforceable contract ever existed. Both issues are constitutional, and this Court's contract clause precedents, and the result they dictate in this litigation, are far clearer than the principles governing the alternative claim, which arises under the infrequently litigated interstate compact clause, U.S. Const. Art. 1

(*Footnote continued*)

Without an enforceable contract, there can be no contract clause violation. *Long Sault Development Co.* v. *Call,* 242 U.S. 272 (1916); *Illinois Central R. R.* v. *Illinois,* 146 U.S. 387 (1892); *Municipal Investors Ass'n* v. *City of Birmingham,* 316 U.S. 153, 155 (1942); *American Toll Bridge Co.* v. *Railroad Comm'n,* 307 U.S. 486 (1939).

Though the Port Authority is an agency of the States of New Jersey and New York, an interstate compact approved by Congress creates it, defines the powers it shall have, and provides the States with continuing authority to infuse it with new powers. The Port Authority Compact, 42 Stat. 174 (1921). Congressional approval of an in-

(*Footnote continued*)
§ 10 cl. 3. This case comes before the Court on appeal, and it is settled that the lower court's judgment must be affirmed if there is a basis for it. "Appellee may urge in support of a decree any matter appearing in the record . . . . although his argument may involve . . . . an insistence upon matter overlooked or ignored by [the lower court]." *United States* v. *American Railway Express Co.,* 265 U.S. 425, 435 (1924). *Municipal Investors Ass'n* v. *City of Birmingham,* 316 U.S. 153 (1942), is dispositive. The appeal there was from a Michigan judgment upholding the constitutionality of State legislation extinguishing unmatured special assessments, tax liens, or other encumbrances on land sold for tax delinquency. This Court said, 316 U.S. at 157:

> "The Michigan Supreme Court assumed, without deciding, that these various provisions did include in the bondholders contract a right to additional assessments after a tax sale for the payment of deficiencies attributable to non-payment of valid prior assessments. 298 Mich. 314, 319, 299 N.W. 90, 92. As a contract must exist before it can be impaired, and as our conclusion against existence of the contract right settles this case, we feel it proper to consider only whether there was a contract between the bondholders and the Village for an additional assessment on the district property to meet deficiencies, instead of undertaking the resolution of the constitutional issue presented by the challenged statutes of Michigan. While this approach forces us to decide the meaning of Michigan legislation without the assistance of the courts of that State, it is necessary to do so because of the obligation of this Court to determine for itself the basic assumptions upon which interpretations of the Federal Constitution rest."

Here, of course, the unresolved issue is one of federal, not State, law.

terstate compact is not a *carte blanche*. The States are limited by the compact terms to which Congress has given its assent. *Henderson* v. *Delaware River Joint Bridge Comm'n*, 362 Pa. 475, 66 A.2d 843, 848, *cert. denied*, 338 U.S. 850 (1949) ("an amendment [of the compact] would be a matter for the contracting States subject, of course, to the congressional consent required by Article I, Section 10, cl. 3 of the Constitution.") The issue is thus whether the restrictions the covenant imposed are consistent with the terms of the Port Authority Compact.

A. Federal Law Governs the Interpretation of a Congressionally Approved Interstate Compact.

Under this Court's precedents, the effect of Congressional approval upon an interstate compact is clear. The meaning of the Compact, and the duties it imposes, are settled as a matter of federal law.[68] *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851); *Wedding* v. *Meyler*, 192 U.S. 573 (1904); *Delaware River Joint Toll Bridge Comm'n* v. *Colburn*, 310 U.S. 419 (1940); *League to Save Lake Tahoe* v. *Tahoe Regional Plainning Agency*, 507 F.2d 517 (9th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975).

68. As the States recognized, the Port Authority Compact required Congressional consent, although whether it did or not, once Congress acts, federal law governs. The compact in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), discussed *infra*, concerned an interstate bridge, a matter having no political significance within the federal system. *Ham* v. *Maine-New Hampshire Interstate Bridge Auth.*, 92 N.H. 268 (1943). Nonetheless, this Court, in holding in *Petty* that the compact's meaning was set by Congress' understanding of the terms the draftsmen employed, did not deem it material that the agreement was one for which no consent was required.

The Port Authority Compact required Congressional consent because of its political significance within the federal system. See, *e.g.*, *Virginia* v. *Tennessee*, 148 U.S. 503 (1893); *New Hampshire* v. *Maine*, U.S. (1976). Despite the compact clause's sweeping prohibition on a State's forming "any Agreement or Compact with another State" without Congressional consent, it is the need for safe-

(*Footnote continued*)

The best and most recent illustration of this principle is *Petty* v. *Tennessee-Mississippi Bridge Comm'n*, 359 U.S. 275 (1959). Pursuant to the interstate compact clause, Tennessee and Missouri obtained Congress' consent to an interstate compact creating a Commission and authorizing it to operate ferries and to build a bridge across the Mississippi. 63 Stat. 930 (1949). The compact empowered the Commission "to contract, to sue and be sued in its own name." Plaintiff's decedent was killed while employed on a Commission-operated ferry on navigable waters. The widow sued the Commission under the Jones Act, claiming negligence. The lower court held that the words used in the compact, "sue and be sued," did not give rise to tort liability on the part of a government agency under the laws of either Missouri or Tennessee. Liability was therefore precluded by sovereign immunity.

This Court reversed, saying, 359 U.S. at 279:

> "[T]he Court is called on to interpret not unilateral state action but the terms of a consensual agreement, *the meaning of which, because made by different States acting under the Constitution and with con-*

(*Footnote continued*)

guarding national interests that determines whether an agreement is subject to the clause. The Port Authority Compact implicated national interests in several ways. First, it promised to benefit New York and New Jersey at considerable expense to States with competing ports. Exploitation of New York harbor, one of the world's great natural harbors, had been seriously impaired by a century of disputes between New York and New Jersey, both of which had jurisdiction over the harbor. The Compact ended the squabbling and improved the Port's advantage relative to the nation's other ports, a subject of vital concern to the States. *Cf.* the Constitution's Port Preference Clause, Art. 1, § 9. Agreements of substantial concern to non-compacting States are the sort of agreements for which Congressional consent is required. *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 464, 513-514 (1838).

The Compact's draftsmen also realized that the activities of the Port Authority would impinge upon federal interests in regulating commerce. Indeed, the overlap of the Port Authority's power with Congress' commerce power was so clear that the Compact seeks to avoid conflict by expressly permitting the agency to receive and exercise a delegation of federal powers.

> *gressional approval, is a question of federal law. . . .* In making that interpretation we must treat the compact as a living interstate agreement which performs high functions in our federalism, including the operation of vast interstate enterprises." (Emphasis added.)

The next issue was what Congress had understood the "sue and be sued" clause to mean. The Court reasoned:

> "This compact, approved by Congress in 1949, was made in an era when the immunity of corporations performing governmental functions was not in favor in the federal field. . . .
>
> "In view of the federal climate of opinion which by that time had grown up around the sue-and-be-sued clause, *we cannot believe that Congress intended to confine it more narrowly here than in the Keifer Case.*" (359 U.S. at 280-281; emphasis added.)

The doctrine that a Congressionally-approved interstate compact is to be construed as a matter of federal law and on the basis of Congress' understanding is soundly based. Without such a rule, a compact could mean whatever its adhering States said it did.

B. *The 1962 Covenant is not Authorized by the Port Authority Compact or Comprehensive Plan Legislation.*

The Port Authority Compact was the first interstate compact to create a continuing bi-State agency. Its draftsmen faced several problems. One was to secure for the new agency sufficient powers to solve the problems that would confront it. That was the central concern in the ratification process within the States, as municipalities and local interests struggled against ceding real power. New Jersey's Governor Edwards vetoed the first version of the Compact

because: "Either the Port Authority should be created with full and complete powers in the premises—organized and authorized to function as a vigorous and virile body, or not at all." BARD at 31. In New York, resolutions of the Democratic and Republican Parties expressly called for adequate powers, and those resolutions were read to Congress.[69]

Even as they wrote provisions assuring that the Port Authority would have sufficient powers to meet the foreseeable challenges, the draftsmen sought to enable the States to enlarge the Authority's powers to meet the unforeseeable, without repeated recourse to Congress, and without opening up the possibility that one or more of the adequate powers so carefully conferred might later be taken away. To achieve these ends, the Compact empowered the two States jointly to enact a great variety of legislation without returning to Congress for additional approval. It did not, however, authorize them to enact legislation withdrawing power from the Authority to act in fields the Compact contemplated. Thus, though any particular session of the Legislature may decide to authorize or not to authorize new Port Authority projects, none may legislate to deny future legislatures that same power.

Article III of the Compact creates the Port Authority and states that it shall have the powers the Compact

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69. The Republican Party resolution declared:

> "We therefore favor a compact or agreement with our sister State which will provide for the creation of a *port authority with adequate powers* to develop this port comprehensively." 61 Cong. Rec. 4920 (1921); emphasis added.

The Democratic Party resolution was similar:

> "We owe it to the nation to organize and develop the port of New York. To that end, we favor a compact or agreement with our sister State, New Jersey, which shall provide for creation of a port district and *a port authority with adequate powers to develop the port comprehensively.*" *Id.*; emphasis added.

enumerates. While it permits the States, or Congress, to give new powers to the Authority, it does not permit removal of old ones. Article VI grants the Port Authority

> *"full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility in [the Port] district."* (Emphasis added.)

The definitional section of the Compact, Article XXII, makes plain that "transportation facility" includes "railroads . . . for use for the transportation of persons or property." See also Stip., p. 236.

Thus, the 1962 covenant was in derogation of Article VI's grant of "full power and authority." It imposed discriminatory financing limits that effectively barred the Port Authority from further passenger railroad responsibilities. Application of those limits to other Authority projects would virtually have barred the Port Authority from ever doing anything. As of 1962, the Port Authority had had experience of ten years or more with only 14 of its facilities. A 691. Eight of those had operated at deficits for more than ten years. Three more had run deficits for seven or eight years. They too would have failed under the covenant's definition of "self-supporting"—having over the ten-year period net revenues sufficient to cover debt service for that period. By that definition, at least 11, and perhaps all, of the 14 facilities would have failed. This was the test a rail mass transit project was uniquely required to pass.

The motive for accepting such a restriction on Authority power is irrevelant. If someone offered the Authority a billion dollars to be used for airport development, on condition that it close its marine and railroad freight terminals and never re-open them without the permission of the grantor, legislation promising adherence to that bargain would violate the Compact.

Under Article VII of the Compact, "the port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either State concurred in by the legislature of the other." The Compact grants no authority whatsoever, either here or elsewhere, that would permit a legislature to contract away a future legislature's opportunity to utilize Article VII to impose additional duties on the Authority.

Article XI authorized the Port Authority to formulate and the States to approve "plans for the development of said district, *supplementary to or amendatory of any plan theretofore adopted.*" Once the States formulated a plan, they were not locked into it, if mutually agreeable alterations were desired. But no privilege to amend Article VI or VII of the Compact is granted to the States, acting either alone or together. "Amendatory" applies only to plans, not to the Compact itself.[70]

To amend their Compact, New York and New Jersey would need Congressional consent, either in the form of advance consent included in the Compact or in the form of special legislation at some later time. Suppose, for example, that after the decision in *Petty* v. *Tennessee-Missouri Bridge Comm'n, supra,* 359 U.S. 275 (1959), the two States involved each passed a law mutually agreeing

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70. Thus, the 1962 covenant has no infirmity if viewed solely as a revocable directive. Any given legislature may choose to direct the Authority to undertake or not to undertake a new mass transit project. What that legislature may not do is take away that same power from future legislatures. To take away that power would be to delete it from the Compact, an impermissible step without new Congressional assent.

Nor is the degree to which the draftsmen of the Comprehensive Plan were concerned with mass transit pertinent to the State's analysis. The Compact plainly authorizes the Port Authority to undertake rail mass transit projects, and for many years now, both the Port Authority and the States have regarded the carriage of people—by air, car, train and bus—as an important Port Authority responsibility.

that the Bridge Commission could not in the future sue or be sued. Those laws would obviously be invalid because Congress consented to the compact creating the Commission with a different understanding. The Court need not speculate whether those laws would by themselves constitute an interstate compact requiring Congressional consent in the absence of the Bridge Commission Compact and Congressional consent to it. The Bridge Commission Compact does exist, Congress did consent to it, and our hypothetical laws would effectively amend it; that they cannot do without new Congressional consent.

In summary, the Port Authority Compact draws a clear distinction among four categories of State implementing legislation: (1) adding powers (granted); (2) revoking powers (not granted); (3) supplementing plans (granted); and (4) amending plans once they are made (granted). The failure of the Compact to authorize legislation revoking the Port Authority's powers was, the evidence suggests, deliberate.

The 1962 covenant violated representations made to Congress—upon which consent to the whole enterprise was granted—that the Authority would have the broad powers necessary for the rational, coordinated organization of the Port. As a consequence of the covenant, the Authority did not have those powers, causing transportation plans to be shaped not by a comprehensive view of the Port's needs but by a warped view, distorted by the combination of the Port Authority's power to build new facilities for automobiles and its impotence to provide new passenger rail service. It was precisely such irrationalities that the States of New Jersey and New York promised Congress the Port Authority would be empowered to remedy in return for the competitive advantages bestowed. That the powers were granted did not mean that they had to be used; the States were entitled to operate on a first-things-first basis. But the States could not and cannot disable the Authority by selling away its power.

The covenant put the States in this position vis-a-vis the federal government. They desperately need mass transit support from the national treasury; without it, the economic viability of the nation's leading population and work center is threatened. The need would be less severe if the States made rational use of the revenue potential of the Port's facilities, revenue derived largely from automotive traffic which it is desired to discourage in any event. If asked why that is not done, the States can only answer that in 1962 the legislatures sold the power necessary to do the job, a power that was sought for "the benefit of the Nation," and that was to be held "in high trust." See Compact Preamble, Article I.

These contentions were met on two principal grounds in the courts below. First, it was argued that *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority,* 12 N.Y.2d 379, 240 N.Y.S.2d 1, *appeal dismissed for want of a substantial federal question,* 375 U.S. 78 (1973), upheld the validity of the covenant as a matter of *stare decisis.* Plainly it did not. The portion of the 1962 legislation adjudicated in *Courtesy* had to do with the World Trade Center. The covenant's validity was neither briefed, argued, nor mentioned in the New York courts or this Court. *Cf. Hicks* v. *Miranda,* 422 U.S. 332 (1975).

Alternatively, it was claimed that the *Courtesy* case set forth a rationale that bi-State legislation affecting the Port Authority is permissible so long as it serves a "port purpose," and that the covenant furthered such a purpose by facilitating the acquisition of the Hudson & Manhattan Railroad. That misconstrues the case. In *Courtesy Sandwhich,* the principal challenge was to the use of eminent domain in support of the World Trade Center. Plaintiffs also claimed that operation of a real estate venture was beyond the scope of the transportation and terminal functions provided for by the Compact. The Court of Appeals

properly rejected the claim because the Compact itself contemplates "the grant to the Port Authority of *additional powers within the framework of the compact.*" (12 N.Y. 2d at 391; emphasis added). The power to run a real estate venture is an "additional power" within the literal meaning of Articles III, VI, VII and XI of the Compact. But under the broad language of those articles, the States could authorize the Port Authority to do anything—even run a medical school. Thus, the port purpose doctrine; the States can grant additional powers only if they are port-related.

The Court of Appeals never said that any and all bi-State cooperative legislation pertaining to the Port Authority is permissible so long as it serves a "port purpose." On the contrary, the "port purpose" doctrine *limits* the legislative power under the extraordinarily broad language of the Compact; it is not a source of authority.

IV

THE COVENANT BECAME INCONSISTENT WITH SUPERSEDING FEDERAL LAW.

Between 1962, when the covenant was enacted, and 1974, when it was repealed, federal policy underwent a change of revolutionary proportions. In 1962, the federal government had no plans for urban rail mass transit: transportation policy was dedicated to the completion of the massive interstate highway system begun under the Highway Act of 1956. See Stip., p. 273.

In July 1964, Congress enacted the Urban Mass Transportation Act, 49 U.S.C. sections 1601 *et seq.*, expressing for the first time a federal legislative interest in urban mass transportation systems. Congress found that "the welfare and vitality of urban areas" and the effectiveness of federally aided programs were being jeopardized by inadequately

coordinated mass transit systems. The Act included among its purposes federal assistance in the development, planning, and establishment of mass transit systems in cooperation with State governments and their instrumentalities. A 717-718.

The scope of the 1964 Act was expanded by the Urban Mass Transportation Assistance Act of 1970 and the National Mass Transportation Assistance Act of 1974. The 1974 legislation contained detailed findings on the role of transportation as "the lifeblood of an urbanized society." A 718-720.

The highway program legislation was also amended: the Federal-Aid Highway Act of 1973 increased the authorization under the Urban Mass Transportation Act of 1964 and authorized the Secretary of Transportation to approve rail projects as part of the Federal-Aid Highway System. A portion of the highway trust fund was made available for this purpose. Stip., p. 273.

Between 1962 and 1974, insolvency forced many of the railroads serving the northeastern United States into extensive court-supervised reorganizations. On January 2, 1974, Congress enacted the Regional Rail Reorganization Act of 1973, 45 U.S.C. sections 701 *et seq.* A 547-549. In this Act, Congress found that rail service is "essential" and necessary "to meet the needs of commerce, the national defense, the environment and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers." By this time, legislative attention had focused on the fact that railroads provide a relatively pollution-free and fuel-conserving means of transportation. By this time too, it had become clear that the covenant stood in derogation of the explicit policy of Congress to support rail mass transit and to encourage the States and their agencies to participate in this "essential" national program.

Congress' approach to air pollution also changed radically in the years following 1962. Mr. Justice Rehnquist summarized the history in *Train* v. *Natural Resources Defense Council,* 421 U.S. 60, 62 (1975), concluding:

> "Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970. . . . These Amendments sharply increased federal authority and responsibility in the continuing effort to combat air pollution. . . ."

In November 1973, the federal Environmental Protection Administrator promulgated stringent air quality standards for northern New Jersey and said that, "The development of large-scale mass transit facilities and the expansion and modification of existing mass transit facilities is essential to any effort to reduce automotive pollution through reductions in vehicle use." See pp. 51-52, *supra.* Similarly, in December 1973, the Federal Highway Administrator stressed "the urgent need to structure toll rates for crossings in major metropolitan areas to encourage use of mass transit and carpools." Page 53, n.35, *supra.* See also the United States Department of Transportation report to Congress, commenting favorably on the diversion of vehicular tolls to mass transit and concluding that "it would appear to be in the Federal interest to permit the imposition of tolls which would promote a more efficient utilization of the urban transportation system." *Id.*[71]

71. For the relevance of federal administrative determinations to the question of federal preemption, see, *e.g., Pennsylvania* v. *Nelson,* 350 U.S. 497 (1956), in which the Court found the statutes of 42 States preempted in light of pronouncements on the subject by the President and the Director of the FBI. See also *N.Y. Dep't of Social Services* v. *Dublino,* 413 U.S. 405, 413 (1973); *Free* v. *Bland,* 369 U.S. 663, 668 (1962).

To Congress' stick and the administrators' calls, the covenant stood as an unresponsive obstacle. As Mr. Tobin explained in 1971, increased Port Authority tolls could not be used to support rail mass transit. A 689.

Under the supremacy clause, a State law must yield if it conflicts with or is otherwise preempted by federal action. See, *e.g., Campbell* v. *Hussey,* 368 U.S. 297 (1961). No explicit determination by Congress is necessary for a Congressional enactment or series of enactments to supersede the exercise of State power in the same area. *Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624 (1973); *Pennsylvania* v. *Nelson,* 350 U.S. 497, 503 (1956); *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148, 156 (1942). The intention to supersede may be manifested explicitly or implicitly. As *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947), said, the State must give way whenever "the state policy may produce a result inconsistent with the objective of the federal statute."

Hines v. *Davidowitz,* 312 U.S. 52 (1941), defines the Court's task:

> "Our primary function is to determine whether under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. at 67-68.

In *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963), both the majority and the minority of a closely divided Court (5-4) reaffirmed the *Hines* test in a case considering the validity of a California avocado law:

> "Whether a State may constitutionally reject commodities which a federal authority has certified to be marketable depends upon whether the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" 373 U.S. at 141.

For the dissent's agreement with the majority's statement of the governing principle, see 373 U.S. at 165. The Court unanimously (Mr. Justice Stevens not participating) approved the *Hines* test again in *De Canas* v. *Bica,* 424 U.S. , 86 S.Ct. 933, 940 (1976), though it concluded that the record did not permit it to decide whether the test was offended by a disputed provision of the California Labor Code.

The 1962 covenant fell squarely within the *Hines* formula: it stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in the Urban Mass Transportation Act, the Urban Mass Transportation Assistance Act, the amendments to the National Highway Act, the Clean Air Amendments, the Emergency Petroleum Allocation Act, and related federal legislation.

As *Hines* indicates, to hold that the covenant frustrates federal policy, the Court need not find that it directly prevents the enforcement of federal law. *Perez* v. *Campbell,* 402 U.S. 637 (1971), is also in point. Arizona's Motor Vehicle Safety Responsibility Act, stopping short of mandatory liability insurance, provided for the indefinite suspension of the driver's license of any person who failed to satisfy a judgment arising out of an automobile accident. The individuals in that case had obtained a discharge from such a judgment in a federal bankruptcy proceeding, but their right to drive in Arizona remained suspended. The federal Bankruptcy Act had as one of its purposes to give debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt," and the Court held the State statute so interfered with that purpose as to render the State law unconstitutional under the supremacy clause.

Two prior cases upholding similar State statutes, *Kesler* v. *Department of Public Safety,* 369 U.S. 153 (1962), and

Reitz v. *Mealey,* 314 U.S. 33 (1941), were expressly overruled. The majority in *Kesler* had erroneously "looked to the purpose of the state legislation and upheld it because the purpose was not to circumvent the Bankruptcy Act but to promote highway safety," rather than to its "plain and inevitable" effect:

> "We can no longer adhere to the aberrational doctrine of *Kesler* and *Reitz* that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. . . . Thus, we conclude that *Kesler* and *Reitz* can have no authoritative effect to the extent they are inconsistent with *the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.*" 402 U.S. at 651-652; emphasis added.[72]

As the precedents make clear, it is not the purpose of the 1962 covenant that controls its constitutionality, but its "plain and inevitable effect." If it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or "frustrates the full effectiveness of federal law," it must fall.

And fall it must. The express purpose of the 1964 Urban Mass Transportation Act was to provide assistance to state and local governments and their instrumentalities in financing such [urban mass transportation] systems. . . ." A 718, 49 U.S.C. section 1601(b). To be sure, this legislation utilized the now-common mechanism of providing federal funds to spur desired activities.

72. See also *Hill* v. *Florida,* 325 U.S. 538, 541 (1945), in which the Court invalidated State legislation regulating union bargaining agents because it conflicted with "the declared purpose of the Wagner Act . . . *to encourage* collective bargaining." Emphasis added. Similarly, in this case Congress seeks to encourage the cooperation of the States and their instrumentalities in the vital task of improving rail mass transit, and the covenant hinders such cooperation.

But to regard such grant programs as offering carrots alone is misleading. Congress has enacted restrictions on air pollution and in 1973 it enacted standby energy rationing programs whose implementation in the absence of mass transit would cause chaos in the States.

Indeed, Congress itself found "that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, *and the effectiveness of housing, urban renewal, highway and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services....*" A 717, 49 U.S.C. section 1601(a)(2); emphasis added.

The 1962 covenant effectively precluded the Port Authority's participation in passenger railroad operations other than the existing PATH system. Joint federal, State and Port Authority programs announced in 1970, 1971 and 1972 were as far as ever from implementation in 1974 when the covenant was repealed. In the meantime, the States and their major instrument for coordinating transportation had been excluded by the covenant from the very area in which Congress sought State cooperation.[73]

Legislatures have a constitutional duty to ensure that their laws adhere to the requirements of the Constitution. Faced with the explicit findings and declarations of policy contained in the federal enactments, the Legislatures could reasonably strike down the covenant as an obstacle both to the States' obligation to cooperate with the federal government and to the federal government's ability to effectuate its policies. The issue is not only whether a court would have declared the 1962 covenant invalid in 1974. The Legislatures too are bound to follow the Constitution and

73. Congress had never consented to the covenant or otherwise indicated that the covenant was consistent with the emerging federal legislation. *Compare DeVeau* v. *Braisted*, 363 U.S. 144 (1960), *with Hill* v. *Florida*, 325 U.S. 538 (1945).

they are entitled to legislate in accordance with their interpretations. See *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

CONCLUSION

For the foregoing reasons, appellees respectfully submit that the Court should affirm the judgment below.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF FOR APPELLANT

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF FOR APPELLANT

Appellant submits this brief in reply to the brief for appellees dated September 11, 1976.

Appellees' brief can be divided, for purposes of analysis, into categories: (1) the history of the Port Authority and the reasons for the Covenant's enactment; (2) the damage to bondholders resulting from repeal; (3) the reasons for the Covenant's repeal; (4) the constitutional validity of repeal; and (5) the constitutional validity of the Covenant, when it was enacted in 1962.

The History of the Port Authority and the Reasons for Enactment of the Covenant.

Much of appellees' "history" of the Port Authority is based on inaccurate references to Professor Erwin Bard's monograph, *The Port of New York Authority,* published in 1942. Appellees cite Bard to support the statement that the Port Authority refused in 1922 to help solve the problems of railroad passenger traffic. (Ap. B.[1] 3). What Bard actually said was that "the Port Authority felt that its resources would be fully occupied with the freight problem, *which it was created to solve,* for some time to come." (BARD at pp. 65-66) (footnote omitted; emphasis added). Nowhere did or could Bard suggest, as appellees say[2], that the Comprehensive Plan was not implemented because of any refusal to help on the part of the Port Authority. The New Jersey Legislature, in 1922, said that the Comprehensive Plan Legislation "does not include the problem of passenger traffic in the territory covered by said port development plan" (Ch. 104, Laws of New Jersey of 1922). More important, the superior court specifically found that neither the Commission which recommended the creation of the Port Authority (A. 65-66) nor the Comprehensive Plan itself (A. 69) contemplated any responsibility by the agency in the field of passenger transit.

Appellant (A.B. 8) and appellees (Ap. B. 5 fn. 6) differ in their interpretation of Governor Smith's veto of Port Authority involvement in rail mass transit in 1927; to settle the dispute we quote the veto message:

1. "Ap. B" refers to the Brief for Appellees. "A" refers to the Single Appendix.

2. Appellees cite Bard at 65-66 and 128-130 to support this; Bard actually said "the Port Authority had felt that its resources would be fully occupied with the freight problem. . . ." (at 128).

> "[I]t has been a great disappointment to me to find that the opposition of the railroads has prevented to date the making of real progress in working out the problem of freight distribution in the port which always has been the main object and purpose of the Port of New York Authority. I am satisfied that the Port Authority should stick to this program and I am entirely unwilling to give my approval to any measure which at the expense of the great freight distribution problem will set the Port Authority off on an entirely new line of problem connected with the solution of the suburban passenger problem.
>
> "For the above reasons, the bill is disapproved.
>
> (Signed) Alfred E. Smith" (A. 573-74)

Governor Smith was an architect of the original Compact and knew as well as anyone "the main object and purpose" of the Port Authority. Thirty-two years later the Legislatures of both States, in continued recognition of this fact, created in 1959 the New York-New Jersey Transportation Agency:

> "as a public agency of the states of New York and New Jersey in dealing with matters affecting public mass transit within and between the 2 states." N.J.S.A. 32:22A-6.

Would New Jersey and New York create a new mass transit agency (Chs. 13 and 14, Laws of New Jersey of 1959; Ch. 420, Laws of New York of 1959) and secure the consent of Congress to their bi-state legislation (73 Stat. 575 (1959)), if the Port Authority was already charged with this responsibility?

Appellees attempt to create the impression that the Port Authority is an entity apart from the States which created it, often acting contrary to the best interest of the States

and in conflict with its basic charter[3] (e.g. Ap. B. 5, 6 fn. 7, 10-14, 26 fn. 15). The fact is that every project undertaken by the agency was the subject of specific bi-state legislative authorization or direction; every minute of the meetings of the Commissioners was subject to the veto of either governor; and every resolution, including those providing increased security for bondholders (Ap. B. 6 fn. 7), was in this fashion approved by the governors of both states.

Appellees to the contrary notwithstanding, a basic Port Authority financing principle is that "the specific projects undertaken by the Authority should be self-supporting, *i.e.*, the revenues of each should be sufficient to cover its operating expenses and debt service requirements". The establishment of the General Reserve Fund in 1931 did not, as appellees say (Ap. B. 7), automatically eliminate the requirement that individual facilities be self-supporting; in fact the General Reserve Fund did not reach its statutory level until 1946, and in the 30 years following its creation no project was undertaken by the agency which was not expected, after a development period, to be self-supporting. In 1961 the then Executive Director of the Port Authority testified:

> "[W]e have never gone into any field before where we couldn't look a bondholder in the face and say, 'We honestly believe that we can make this self-supporting and that you'll get your money back.' We have been wrong. In the case of the motor truck terminals, certainly we were wrong. And those terminals by themselves have not earned enough and without the pooling of the general reserves wouldn't be enough." (A. 648; Statement of Executive Director of the Port Authority before the Farley Committee, May 5, 1961).

3. It is remarkable to contrast appellees' history of the Port Authority with the agency's even-handed view of itself in pages 1-21 of its Motion to Dismiss Appeal of Daniel M. Gaby dated June 7, 1976.

The dangers inherent in grouping projects, with the resulting necessity for other controls, was recognized by Professor Bard in 1942. Witness the remainder of the quotation appellees cut short (Ap. B. 7):

> "If existing revenues were ample and dependable the banker would need to give as little scrutiny to the self-sustaining capacity of the new project as he would to a similar project under consideration by an agency supported by the taxing power. In sum, as autonomous borrowing power becomes fully implemented, the safeguard supposed to reside in the scrutiny of the bankers fade out. *Similarly the agency itself is less constrained to estimate conservatively. It may now proceed with projects which only speculative estimates could justify as self-sustaining, or which may not be self-sustaining at all. The way to increased construction is opened, but the safeguard against unjustified expenditure is removed.*" BARD at 325.

As Professor Bard also said:

> "On the other hand, any plan to group projects will bear careful watching as it tends to dissolve the responsibility that any particular project shall be self-sustaining. The concept of self-sustaining then becomes a description of the method of financing rather than an economic justification. In that event thought must be given to imposing other criteria and controls upon the autonomous construction of public works." BARD at 265-66.

When the acquisition of the H & M, the first perpetual deficit facility ever to be considered by the Port Authority, became a possibility, thought was given, as Bard predicted, "to imposing other criteria and controls". The result was the 1962 Covenant. The purpose of the Covenant was to prevent, after the acquisition of the H & M, the entry of additional deficit-ridden railroads into the General Reserve

Fund family except upon compliance with reasonable restrictions. The Covenant was necessary precisely for the reason that the so-called Section 7 certification did not accomplish this purpose. Although appellees try to create a different impression by a truncated quotation of one phrase from a 1961 speech by the then General Solicitor of the Port Authority (Ap. B. 10), what Mr. Goldberg actually said about the Section 7 certification makes it clear that the provision was intended as nothing more than a reiteration of the common law, not some dramatic new protection for bondholders:

> "To us, this [the Section 7 certification] was merely a contractual codification of an agreement and obligation which we had anyhow, but it has helped to allay the fears of the financial community." (A. 840).

Although the H & M was hopelessly bankrupt, with sufficient cash to operate for only two years, and all other mass transit systems within the Port District were deficit-ridden, the Port Authority is accused by appellees of manipulating investor concern with respect to unquantified involvement of the agency in deficit rail mass transit. (Ap. B. 10-14). But appellees cite nothing in support of this conclusion which was not spread on the public record in 1961 as part of the well-publicized Celler Committee hearings, and known to the Farley Committee in New Jersey when the Covenant concept was being studied; nor was that committee shocked by the conclusion of Commissioner Kellogg that the agency could never secure the private financing of perpetual deficit rail mass transit without statutory limits on the agency's involvement, a conclusion now labelled an "extraordinary claim" by appellees (Ap. B. 15). Appellees also distort the uncontradicted testimony of Mr. John Thompson, the dean of municipal bond analysts, to the same effect. Mr. Thompson said categorically that the Covenant was enacted in

response to investor concern at the time that the H & M would be only a first step in increasing involvement of the agency in deficit rail mass transit (A. 854-861).[4]

Appellees conclude that the Legislatures in effect were forced by their own agency to enact the 1962 Covenant as a condition to Port Authority takeover of the H & M (Ap. B. 16-17). They charge that Appellant "erroneously characterizes" the 1959 Joint Assembly Committee report on Assembly Bill No. 16. In a footnote they quote *half* of a sentence from that report but do not indicate that theirs is only a *partial* quotation. What the Committee actually said was that while the Authority:

> "no doubt could undertake an activity which would involve a deficit—even a permanent one—*it could only do so if there were real assurance that the size of the deficit would be such that there could be no doubt of its ability to absorb it*" (A. 594). (Emphasis added.)

The emphasized portion of the quote, which in effect predicted the quantified undertaking which was effected by the 1962 Covenant, was omitted by appellees without any indication of a deletion (Ap. B. 16 fn. 10).

In the same vein appellees say that the 1959 Committee "concluded that the Authority should assume some mass transit deficits" (Ap. B. 16) but they do not *quote* the Committee report which said that such assumption should be only of "modest deficit operations of a predictable nature" (A. 596), *not* an unquantified assumption of a rail mass transit facility.

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4. "I think it was the result of this Covenant not to go further in this field that upheld the credit and borrowing power of the Port Authority over these years, and that was its purpose. It was not to give some bounty to the bondholders. It was to uphold the borrowing power of the Port Authority as an agency of the two states for the enterprises which the two states had assigned to it" (A. 860-861).

Appellees[5] offer a complete redefinition of the aims of bondholders:

> "In reality, and as Dr. Bard found back in 1942[6] and the Assembly Committees reported in 1959,[7] bondholders needed assurance that the Port Authority would not be so burdened with deficits that its profitable facilities might have difficulty carrying them." (Ap. B. 20).

Investor concern was much more specific—potential investors needed assurance that the Port Authority was not about to embark upon an unquantified and unquantifiable journey into an area calculated to assure perpetual deficits, increasing deficits, caused by the economic impossibility of making rail passenger transit self-supporting. It was this single specific concern that John Thompson and his clients were afraid of, that prompted the United States Trust Company of New York, then the largest single holder of Port Authority bonds, to cross them off the approved list until the Covenant was enacted.

Damage to Bondholders as a Result of Repeal

Appellees bitterly attack the two independent grounds of impairment which were demonstrated below: (1) that repeal cancelled a security device valuable to bondholders and (2) that repeal adversely affected the secondary market for the bondholders' investments.

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5. Appellees suggest in a footnote (Ap. B. p. 17 fn. 11) that there was no legislative history annexed to the 1962 legislation embodying the Covenant. They do not quote Governor Rockefeller's message on signing the legislation:

> "To preserve the Port Authority's credit strength the bill includes a covenant by the two States that additional deficit financing of future railroad projects will only be undertaken within the financial limits set forth in their covenant" (A. 675).

6. Dr. Bard made no such finding.

7. The Assembly Committees made no such report.

In discussing the "objective" protections for bondholders which preceded the Covenant's adoption and which remain after repeal appellees rely strongly on a statement by Mr. Goldberg, concurred in by Mr. Zarin, that Port Authority revenues could not simply be diverted to "subsidize the private railroads to the extent of their commuter operating deficits." (Ap. B. 21). This is a true statement, one that Appellant has never questioned, since Section 7 of the Series Resolutions[8] requires that a deficit facility first be brought *into* the General Reserve Fund family before it can be nourished by revenues from other facilities. Appellees, however, purport to reason from this that the Covenant was "redundant", while admitting, as they did in the courts below, that *only* the Covenant would prevent perpetual deficit rail operations in addition to PATH from entering the Port Authority structure. Appellants again admit this later in their brief (Ap. B. 59, 61).

Appellees then say that before the Covenant was enacted it was impossible for the Port Authority to take on any mass transit project that might "endanger the bondholders' security" (Ap. B. 22), admitting in effect that *only* by the Covenant's enactment as a statutorily prescribed limit on the Port Authority's financial participation was the agency able to make any material contribution in this area.

Appellees go on to describe the 1.3 test and the "[o]ther bondholder protection"[9] that preceded the Covenant as reasons why the Covenant "added nothing"

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8. At Ap. B. 22 appellees, by parsing the requirement of *one* opinion into three separate phrases, create "three conditions" where one opinion stood before.

9. One of which is described by appellants to mean that "the Authority is contractually obliged to run in the black" Ap. B. 25. Every municipal obligor that ever defaulted was "contractually obliged to run in the black." Appellees no longer cite, as they did in their lower court briefs, as "perhaps the most important" bondholder protection the agreement by the two States that they will not diminish or impair the power of the Port Authority to levy tolls

(Ap. B. 25). If appellees are correct private investors should have welcomed the entry of a revenue bond agency into a perpetual deficit field since "existing protections" were more than adequate.[10]

Appellees take issue with Appellant's analysis of the 1.3 test, concluding that:

> "Since the building of a facility that would generate deficits large enough to cause future difficulty with the 1.3 test would bring the Port Authority to 'the point of enforced stagnation', end its 'ability to finance any future projects', and endanger the Port Authority 'as a healthy, vigorous organization,' the building of such a facility would obviously run afoul of the Section 7 certification requirements" (Ap. B. 28).

This is simply an erroneous conclusion of appellees with no support, in Section 7, the record or otherwise.

Appellees next contend that the Covenant's requirement of a "self-supporting" certification is qualitative rather than quantitative. They question Mr. Thompson's testimony precisely on this point (A. 872) but they did not attempt to offer any contradictory evidence. Instead they say that this conclusion was rejected by the Farley Committee (which did not reject it), by the Port Authority (which employs it, describing the Covenant as a "one-times

in connection with any facility owned or operated by the Port Authority the revenues of which shall have been pledged as security for bonds. It is understandable that appellees have changed their minds about the importance of this provision, since this is the same provision which the States so clearly ignored in 1973 and 1974 when they forced the Port Authority to withdraw its PATH fare increase application (A.B. 16 fn. 12).

10. Appellees cite "other bondholders protections" to include "provision for sinking fund payments" and "schedules of mandatory periodic requirement of bonds." Thus, to appellees, provisions requiring payment of bonds when due are to be equated with "bondholder protections".

coverage test", A. 1067) and by the Port Authority's auditors (who never considered the point, but rather only considered allocation of *past* revenues, A. 650-651, 732-36, not estimates of *future* revenues). Although appellees question the conclusion that the Covenant's requirement is considerably more precise a calculation than Section 7's since the Covenant examines only one facility (Ap. B. 29-30), who in this day and age can seriously contend that a rail passenger transit facility can itself be self-supporting[11] under any conceivable test? Appellees have no difficulty at all in suggesting this conclusion.

Appellees then attack Appellant's contention that only the Covenant would prevent a diversion of at least $128.4 million on the PATH-Plainfield project by saying that the argument is "confusing" because based on a "rejected" plan (Ap. B. 31). The plan has now been tentatively approved, and one certain feature is that diversions of Port Authority revenues far in excess of $128.4 million are contemplated.

Appellees continue to insist that rail mass transit diversions will actually come from "the more than $40 million in annual revenues that the Authority has already begun to collect as a result of the toll increase instituted in May 1975 for the specific purpose of financing mass transportation projects. . . . In three or four years, the Port Authority will have earned the entire $128.4 million even though it will have spent far less" (Ap. B. 31-32). This, respectfully, is nonsense. In a footnote appellees charge that Appellant "invents something" it calls "surplus reserves in excess of

11. "Self-supporting" is a rather fundamental concept. You set up an equation and add up the revenues on one side and the expenses and debt service on the other. One side of the equation will either be equal to or will exceed the other side. It is that simple. One wonders why appellees protest this concept so strongly, if not to lay the foundation for a future certification by the commissioners, appointed by the governors, that self-supporting means something else.

mandated bonded debt service" and that Appellant "asserts that this creature grew by only $296,000 in 1975." (Ap. B. 32 fn. 21). We call the Court's attention to pages 738a-739a of the Single Appendix, which sets forth the distribution of income analysis which was included in the Stipulation Among Counsel dated December 20, 1974. The bottom line, at A. 739, is the so-called "invention" of Appellant—the Port Authority's surplus reserves in excess of mandated bonded debt service. As the Stipulation makes clear, this distribution of income analysis was *provided by the Port Authority* at the request of counsel for Appellant (A. 738).

Then appellees complain that "[n]o page or chart of the [1975 Annual] Report itself is cited" to explain how the amount was calculated. Appellees know full well how the amount was calculated; it was calculated in exactly the same way as the chart in the Stipulation Among Counsel was calculated. Thus, net revenue before debt service was $198.6 million in 1975 versus $184.5 million in 1974; net increases in reserves were $11.9 million in 1975 versus $18.3 million in 1974; and reserves at year end in excess of the next two years' (1976-1977) bonded debt service were $23,866,000 in 1975 versus $23,570,000 in 1974, a difference of $296,000, not the approximately $27 million that appellees would have the Court believe was realized by the toll increases. This is not "creative accounting" (Ap. B. 32 fn. 21) but rather exactly the same distribution of income analysis as that set forth in the Stipulation Among Counsel.

This analysis shows beyond question that the toll increases were necessary to enable the Port Authority simply to maintain the status quo in the light of enormous increases in operating expenses. There is no windfall which can be diverted to deficit rail mass transit.

How can appellees say on one page of their brief that the Covenant's protection is "redundant" (Ap. B. 21) and on another (Ap. B. 59, 61) that only the Convenant prevents

diversion of hundreds of millions of pledged revenues and reserves to deficit rail mass transit? (A 528).

Appellees are also quick to misquote Mr. Thompson (compare his testimony at A. 961 with appellees' summary at Ap. B. 34) and to suggest that Mr. Thompson could not have relied on the Covenant because he had never analyzed a hypothesis which he described, quite fairly, as a "never-never land" (A. 945). Appellees say "[t]he point is important" (Ap. B. 34). The point is frivolous. Appellees set up a preposterous supposition, knock it down, and then conclude that since the Covenant would not prevent it the Covenant's protection was "modest" (Ap. B. 34)[12].

In another footnote appellees complain about Appellant's references to the deposition of its Executive Vice President and then say "nor did Appellant offer any of its purchase and sale records to show that the Covenant had any bearing on its transactions in Port Authority bonds." (Ap. B. 37 fn. 24). This is simply false. Appellant offered its memorandum of April 27, 1961, E 346, and this is what it said[13]:

> "The Port of New York Authority is offering $35,000,000 consolidated bonds maturing serially on March 1, 1962 through 1981 on May 3. These bonds will be an obligation of the Authority for the payment of which the full faith and credit of the Port of New York Authority are pledged.
>
> "There is some question as to the future marketability of Port bonds. At the present time, certain questions have developed regarding the scope of responsibilities of the Authority. Recent legislation by the State of New York provides for the acquisition of the Hudson and Manhattan Railroad Com-

12. Appellant has never conceded that the Covenant could be satisfied by a 10-year subsidy, as appellees suggest. The plain language of the Covenant—*"derived from or incidental to such facility"*—strongly indicates a contrary conclusion.

13. Appellees say that the trial court's exclusion of this evidence was "clearly proper". It was clearly improper. *See Interchemical Corp.* v. *Watson,* 145 F. Supp. 179 (D.C. Cir. 1956).

pany and the establishment of a World Trade Center in lower Manhattan. The act passed by the New York State Legislature provides for no limits on either the revenues or the General Reserve Fund balances for use in the Hudson and Manhattan Railroad acquisition. Without such a provision, the present security behind Port bonds is weakened to a considerable degree. It is prudent to assume that even with the acquisition by a capable group of administrators such as the Port Commissioners, the Hudson and Manhattan Railroad will operate at a deficit until some major improvement on use of this facility occurs.

"It is further disturbing to note that the Governor of the State of New York in his memorandum of approval leaves little doubt that it is his thinking and that of his advisers that no guarantee be given to the bondholders of Port Authority obligations. There is further indication that suggests the Governor is contemplating future additional acquisitions of other commuter railroads by the Port Authority. Towards this end, the memorandum includes a restatement of the Compact of 1921 regarding the Port Authority and its "full power and authority to purchase, construct, lease, and/or operate any terminal or transportation facility." While such an eventuality will probably take some years to become effective, one can give credence to this possibility and its impact upon credit and markets for bonds of the Port of New York Authority.

"It is possible to replace current holdings of the consolidated bonds with other good quality obligations bearing similar coupon rates and at similar yields. It has been determined that the policy of the Trust Company will be to review holdings of Port of New York Authority bonds. We will, therefore, not use any bonds of the new issue and you will be contacted within a few days regarding current holdings."

This was the reaction in 1961 of the agency's largest bondholder to Port Authority involvement in deficit rail

mass transit without limitation—the bonds were simply crossed off the approved list.

Appellees then conclude their footnote (Ap. B. 37 fn. 24) with a *partial* quotation of an April 4, 1974 Trust Company memorandum which stated *in part:* "Efforts to repeal the 1962 Covenant by legislative action should not be viewed with alarm." E. 454. But appellees do not quote the *immediately following* sentences of the memorandum, explaining *why* there should not be a wholesale liquidation of Port Authority holdings:

> "It is likely that bondholders will challenge the repeal measure in the courts, contending that the repeal of the 1962 covenant would violate provisions of the Federal Constitution. The Trust Company, as the trustee of the last two issues of the Authority's bonds, may be obligated, either in conjunction with a bondholders' group or unilaterally to challenge this repeal, if the repeal is legislated. The final outcome of the enforceability of the covenant will be determined in the courts. It is also possible that a separately secured class of bonds could be issued for additional mass transit operations, thus preventing the dilution of the revenues and reserves pledged to the existing obligations (Consolidated Bonds) of the Authority. According[ly], we do not suggest the sale of present holdings at this time."

Appellees discuss at length the continued 'A' rating accorded Port Authority Consolidated Bonds since repeal. (Ap. B. 37-40). The fact is, however, that neither Moody's nor Standard & Poor's have evaluated a Port Authority bond issue for mass transit purposes which would violate the provisions of the Covenant. Moody's took care to emphasize the tentative nature of its continued "A" rating in the very sentence of the report quoted by appellees *in part* at Ap. B. 39:

> "The Superior Court in New Jersey has upheld New Jersey legislation that repealed the 1962 covenant restricting Authority involvement in deficit

> mass transit operations. This decision is a matter of deep concern to bondholders generally, and the decision has been appealed. *The effect on the Authority cannot be determined at this time in absence of a definite plan for financing mass transit projects and facilities deemed to be non-self-sustaining. In the meantime,* earnings of the present facilities are good, reserves for debt service continue strong, and recent toll increases have further strengthened financial position at this time." A 484-485 (emphasis added).

The emphasized portion of the above quote was deleted by appellees in their reference to the Moody's report. (Ap. B. 39).

The market has made its own assessment of the worth of a Port Authority bond without the Covenant, even where the issuance was not for any additional mass transit purpose. In October, 1973 the Port Authority sold its last bond issue prior to repeal of the Covenant. The interest rate was 5½%. In July, 1976 the Port Authority went back to the market for the first time in over two and one-half years. Not one penny of the issue was intended for any mass transit purpose which would have been violative of the Covenant. Yet the interest rate required to sell the issue was 8.20% and the underwriters purchased the bonds at a $20 (per bond) discount, resulting in a net interest cost to the agency of 8.27%, or 2.77%, almost three points, higher than the previous issue.[14] *The Wall Street Journal's* explanation of the extraordinary high interest rate ("almost 15% for single persons earning about $26,000 or families making about $36,000" (A. 1123)), was as follows:

> "'Large buyers have refused to touch the Authority's bonds ever since the New York and New Jersey legislatures several years ago repealed the 1962 covenant and thereby weakened the protection

14. More recently, the agency sold bonds, in a period of extremely low interest rates, at a coupon of 7%, or 1½% above the October, 1973 issue. The bid was 99.21, for a net interest cost of 7.0290%.

> afforded to bondholders,' a dealer remarked" A. 1123.

If appellees were correct in contending that "the Covenant was immaterial and that the Port Authority would net $40 million in new revenues" as a result of repeal then institutions should have been clamoring for the new bonds. They were not. Nor do appellees attempt to explain why, in their own words, Standard & Poor's expressed "concern about the effect of future Port Authority involvement in mass transit" (Ap. B. 39) or why Moody's said that the decisions in this case "are a matter of deep concern to bondholders generally" (Ap. B. 40). The rating agency axe has yet to fall, but the writing is on the wall for all to see—once the State begins its announced diversions of Port Authority revenues and bonds are issued to finance the new intrastate extensions the rating agencies will make their reassessment.

Appellees refer to *four* of the literally hundreds of reports by investment analysts during the period from the Covenant's enactment to its repeal, which reports did not discuss the Covenant, and concluded from this that the Covenant was "too unimportant to mention". They do not qualify this conclusion by any reference to P-1, P-2, P-7, P-10 or any of the hundreds of other investment reports which described the Covenant in detail and emphasized its importance to investors.

One has only to look at Appellant's charts (P-89, P-92, P-95) to see the damage to the secondary market for Port Authority bonds caused by the repeal. The trial court pointed out:

> "This conclusion was expressed by several witnesses who voiced the opinion that not only was the secondary market price of the bonds adversely affected, but that the nature of the market was altered in the sense that the market for the bonds

> became thin and large institutional investors refused to purchase the bonds after repeal. There can be no question but that immediately following repeal and for a number of months thereafter the market price for Port Authority bonds was adversely affected. This was conclusively demonstrated by plaintiff's exhibits comparing the market price of selected Port Authority bonds, before and after repeal, with the prices of comparable bonds over the same period" A. 111.

Appellees take issue with the trial court's conclusions, notwithstanding the total lack of any contradictory evidence offered by them. They make the flat statement that "[t]he secondary market for Port bonds was unaffected" by 1961 New York Legislation directing an H & M takeover without Covenant protection (Ap. B. 41), but they cite no expert testimony in support of this conclusion, since none was offered. As we know from the Farley Committee Report, the reason the market was not affected is that New Jersey refused to so endanger "the future utility of the Port Authority to the 2 states" (A. 654-655) and insisted that the Covenant be enacted. Appellees cite a Dun and Bradstreet report in 1962 rating the Port Authority's prospects as "Superior", in the face of bi-state legislation requiring a H & M takeover, but they do not quote the basic conclusions of the report, which condition the analysis on the adoption of the 1962 Covenant:

> ". . . The Authority is studying the possibility of acquiring and improving the Hudson & Manhattan Railroad Company. As noted, the Authority has no power to proceed with this project, or with the World Trade Center, without authorizing legislation from both states. The Authority has stated that upon due statutory authorization it might be able to sell bonds for such acquisition if investors could be given contractual assurance with statutory protection that its General Reserve Fund could not be

> applied to commuter rail transit deficits beyond those of the present and existing Hudson & Manhattan Railroad. It has specified additional protections necessary to insure financial soundness of the undertaking" (A. 176-177).

Appellees then cite the successful sales of Port Authority bonds while the Covenant was in effect as support for the Covenant's alleged immateriality, since investors supposedly were on notice that the Covenant "might or might not endure" (Ap. B. 41).[15] To say that this is contradicted by the record is an understatement (E.g., A. 861, 872, 873, 874, 875, 879, 921, 922, 939, 951, 980, 981).

Appellees then refer to the sales of the 40th and 41st series of consolidated bonds, sold in June and October, 1973, after the prospective repeal of the Covenant in May, 1973, as evidence that investors were willing to purchase consolidated bonds at reasonable interest rates even though the Covenant was not part of their bond contract. Appellees ignore the undisputed fact that the Covenant continued in effect with respect to outstanding consolidated bonds, which, by their terms, would not finally mature until 2007. Thus the Covenant remained binding in fact on the Port Authority. This was made clear by the agency in its Official Statements for the 40th and 41st series, each of which contained the following representation:

> "The statutory covenant against dissolution of pledged revenues and reserves by additional passenger railroad facilities, which is discussed in the paragraph quoted above, remains in effect with respect to affected bonds, and remains binding on the Authority although it does not apply to the bonds of the present offering."

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15. In another footnote (Ap. B. 41 fn. 26) appellees suggest that Mr. Thompson was "aware at all relevant times that under certain circumstances a State may constitutionally abrogate its contracts and that other pledges had been repudiated". What Mr. Thompson actually said was:

> "Your Honor, a day or two ago, I read a brief prepared by someone on this subject which cited some cases pro and con

It was the uncontradicted testimony of Gordon Fowler that there was approximately $1,700,000,000 of Port Authority bonds outstanding and that it was "unreasonable to expect that these bonds would be fully retired in the immediate future or even the foreseeable future and therefore the 40th series bonds were indirectly protected by the Covenant" (A. 1105).

One has only to compare the last sale of bonds by the Port Authority before repeal of the Covenant, at a 5½% interest rate, with the first sale of bonds by the agency after repeal, at an interest cost to the Port Authority of 8.27%, to see the difference in evaluation by investors of bonds with the Covenant and bonds without it.

Appellees spend only two pages of their brief (Ap. B. 43-45) discussing the closing of the prices for Port Authority and comparable bonds in February of 1975. They do not attempt to contradict the testimony of Appellant's expert witnesses explaining the technical reasons for this closing. And the continuance of the closing after February, 1975 was due entirely to artificially low prices for Massachusetts Port Authority bonds (as a result of political threats in Massachusetts to the independence of that agency) and not to any reevaluation of the Port Authority's credit by investors. A. 446-476. This was dealt with at length by Appellant in its briefs before the New Jersey Supreme Court which are in the record.

The Reasons for the Repeal of the 1962 Covenant.

Appellees would have this Court believe that all of the Legislative history which preceded the adoption of the

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and came to the conclusion that this case was in the class of those where the police power would not prevail" (A. 951).

Shortly thereafter he said: "Well, there have been other repudiations of solemn pledges granted. Some of them have been taken to Court and beaten down too" (A. 952).

prospective repeal in 1973 also formed the basis for the retroactive repeal in 1974. To disprove this contention, it is necessary only to stop the clock for a moment on October 1, 1973. On that date, the Port Authority successfully sold $100 million of consolidated bonds at an interest rate of 5½%, which was ½% lower than its previous sale in June, 1973. Investors were well aware (1) that the Covenant had been reconsidered by both legislatures over the course of the preceding year; (2) that both legislatures, after such reconsideration, repealed the Covenant only prospectively, expressly maintaining in effect the Covenant's protection with respect to outstanding affected bonds and the Covenant's indirect protection in fact for future issues of consolidated bonds; (3) that the legislation embodying the Covenant had been upheld by this Court and by the highest court in New York (*Courtesy Sandwich Shop* v. *Port of N.Y. Authority*, 12 N.Y. 2d 379, *appeal dismissed*, 375 U.S. 78, *reh.* denied, 375 U.S. 960 (1963)); (4) that the Covenant itself had been upheld in federal court (*Kheel* v. *Port of New York Authority*, 331 F.Supp. 118 (S.D.N.Y. 1971), *aff'd on other grounds*, 457 F.2d 46 (2nd Cir. 1972); *cert. denied*, 409 U.S. 983 (1973)); and (5) that the Port Authority, with the approval of the States, was defending the Covenant in the New Jersey Superior Court (*Gaby* v. *The Port of New York Authority*). As a result of this history of litigation and the express legislative reaffirmation of the Covenant by the legislatures of both States, after exhaustive study and consideration, the Covenant, more than at any time in its history, was presented to investors as a solemn, binding obligation of both States intended to endure so long as affected bonds remained outstanding. A few months later, with the new administration in New Jersey, the Covenant was retroactively repealed.

Appellees discuss at length the energy crisis (Ap. B. 46-50), health and environmental factors, (Ap. B. 50-52), and the Port District's public transportation requirements (Ap.

B. 53-60). They cite the "post-repeal plans" for financing mass transit, saying again at Ap. B. 60, 61 and 62 that the toll increases are generating $40 million in new revenue annually.

No one disputes that there was an energy crisis in the winter of 1974, that the environment should be improved or that more and more efficient mass transit is desirable. What is disputed, and which was disputed in 1961, is (1) whether these problems constitute such "emergencies" in the eyes of the law, as to justify the use of the States' police power to abrogate its solemn promise to its citizens, upon which its citizens relied, and (2) the extent of involvement in a perpetual deficit activity by a revenue bond agency dependent for its survival on private funds contributed by private investors who, in good faith, relied upon the security provisions promised to them by the agency and the States.

The Constitutionality of Repeal.

We submit that the key to the constitutional validity of the retroactive repeal of the 1962 Covenant is set forth in the Official Statement recently distributed by the Port Authority in connection with the issuance of the Forty-Third series of consolidated bonds. In describing the proposed extension of PATH to Plainfield the Statement says in part:

> "The Port Authority has undertaken active preparations to carry out the statutory programs. In May, 1975, it filed an application with the Urban Mass Transportation Administration of the U. S. Department of Transportation (UMTA) for $277,600,000 to pay part of the cost of extending the PATH system to Plainfield. It is contemplated that the Port Authority Trans-Hudson Corporation (PATH) would enter into an agreement with the State of New Jersey or a subsidiary corporation of the State under which PATH would acquire all

> necessary real and personal property out of the proceeds of future issues of Port Authority bonds and UMTA grants, and lease said property to the State or its subsidiary. *The amount of rent to be paid by the State would depend primarily on the outcome of the litigation relating to the repeal of the statutory covenant (see "Litigation", pp. 20-22). That litigation will affect the extent to which the project or the State must cover debt service on the Port Authority's bonds issued for the project."* (Emphasis added.)

In other words, if the retroactive repeal of the 1962 Covenant is upheld, the Port Authority will be required by the State to divert pledged revenues from other facilities to the payment of debt service on the bonds issued to finance the PATH extension. If, however, the retroactive repeal of the Covenant is declared unconstitutional the State of New Jersey will simply increase its rental payments by an amount sufficient to cover debt service. This case does not involve energy or health or the environment or any other "emergency." It involves money, and only money; a scheme by politicians to shift the burden of financing public purpose projects from the State to an independently financed public agency.

At the very outset of their legal argument appellees completely misstate Appellant's argument and then complain that Appellant has reversed its position on appeal:

> "[A]ppellant chooses to deny here a proposition it conceded below: that State contracts are subject to legislative action under the State's police power" (Ap. B. 63).

This is simply not what Appellant said in its brief. Rather, Appellant's position is:

> "A State is competent to conclude contracts secure against any impairment by subsequent legislative action, even action taken under the guise of the

State's police power. '[T]he right to make binding obligations is a competence attaching to sovereignty.' *Perry* v. *United States*, 294 U.S. 330, 353 (1935). The 1962 statutory Covenant here in issue, a solemn undertaking between a State and its creditors, is a classic example of a contract secure against impairment. (A.B. 48)

• • •

"On occasion, contracts through judicial interpretation have been found to be subject to subsequent legislative impairment as a proper exercise of a State's police powers. But where, as here, the contract is between the States and creditors of the State agency, it is settled that the States may not thereafter act in derogation of their solemn undertaking." (A.B. 50)

Having thus misstated Appellant's position, appellees attack the straw man they have set up and effectively argue the point which Appellant concedes is the law: that on occasion some State contracts, not involving a third-party loan to a State or its agency, have been held subject to reasonable *modification* (but never outright cancellation, as in the present case) where found to be a reasonable exercise of the police power. We agree. See Ap. B. 65-72. And appellees concede the basis tenet of Appellant's case:

> "This is not to say that one legislature can never bind the next, for plainly it can to some extent despite the general presumption against such a construction" (Ap. B. 68).

Assuming as both sides now do that a Legislature is possessed of competence as a sovereign to enter into binding contracts one cannot present a more compelling set of circumstances for such a conclusion than the present case. This case does not involve changing the county seat (*Newton* v. *Board of County Commissioners*, 100 U.S. 548

(1880)), or repealing a lottery franchise (*Stone* v. *Mississippi*, 101 U.S. 814 (1880)), or repeal of a butchers' monopoly (*Butchers' Union Co.* v. *Crescent City Co.*, 111 U.S. 746 (1884)). Rather it involves who should pay for intrastate rail mass transit deficits: the state or the bondholders of an agency charged with interstate freight responsibilities.

Appellees do not attempt to distinguish the cases cited by Appellant to support its position that the contract here in question is not subject to legislative abrogation. Rather they say that *Wolff*[16] and *Louisiana* v. *Pilsbury*[17] did not survive *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U.S. 502 (1942). Far from overruling *Wolff and Louisiana* v. *Pilsbury*, the Court in *Faitoute* did not even cite them.

Continuing their argument that the Covenant was subject to cancellation without notice, appellees say:

> "The covenant did not state that it was immune from the police power and its silence on this point should itself be dispositive." (Ap. B. 74).

This silence is hardly dispositive. The principal legislative history of the Covenant, the Farley Committee report, specifically described the Covenant as "constitutionally protected". It was sold to investors as secure against change, and independent bond counsel so opined a mere two years before its abrupt cancellation (A. 692). Appellees say in a footnote (Ap. B. 75) that "all contracts are constitutionally protected" but that Appellant misunderstands the scope of this protection, *i.e.*, that it is nonexistent. Appellees quote from the superior court opinion which in turn quoted from Senator Farley who said "one

16. *Wolff* v. *City of New Orleans*, 103 U.S. 358 (1880).
17. 105 U.S. 278 (1881).

Legislature cannot bind a subsequent Legislature involving policy," (A. 88), but they do not complete the colloquy, which concluded:

> "Q. It seems to me on that basis, that you enter a contract on the basis of legislation passed, that contract is going to stand and some later legislature is not going to be able to change it. A. That's right" (A. 88).

Thus, having misstated Appellant's position, having urged that two cases were overruled by a case which did not even cite them, and having quoted half of a colloquy which concluded that the Covenant was not subject to future cancellation, appellees reach the conclusion that the Covenant was cancellable at the whim of a change in administrations—a conclusion that flies in the face of the facts. The Covenant by its very terms was to endure "so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the Port Authority." Nevertheless appellees argue (Ap. B. 76) that since the Covenant was subject to change without notice, no one could have relied on it, even though the superior court reached exactly the opposite conclusion, expressly holding that bondholders did rely (A. 110). If in fact any credible investor or municipal bond analyst agreed with appellees' view of the case why were they not called to testify at trial?

Appellees repeat that the only "essential obligation" entitled to constitutional protection in a bond contract is the simple promise to pay principal and interest (Ap. B. 79), implying that all other covenants, regardless of their importance as security devices, are subject to cancellation if a majority of the Legislature decides to do so under some vague and ill-defined notion of the police power. Appellees

would reduce all municipal obligations to unsecured term notes for purposes of investor analysis.

Appellees cite *New Jersey Sports & Exposition Authority* v. *McCrane*, 61 N.J. 1, *appeal dismissed*, 409 U.S. 943 (1972) as a case which clearly put bondholders on notice that the authority's bonds were subject to change without notice. There was in fact one passing reference to the police power, but this is what the court said about the exercise of that power:

> "The principles applied in Sills are equally applicable here, and it may be stated definitively that the bonds of the Authority in the hands of purchasers constitute valid contracts binding on the State according to their terms, and are entitled to the same constitutional protection against impairment at the hands of subsequent Legislatures as are the bonds of the Educational Facilities Authority, N.J.S.A. 18A:72A-10, 19, of the New Jersey Mortgage Finance Agency, N.J.S.A. 17:1B-10(g), 17, and of any other similarly constituted agency created for the performance of a public purpose whose bonds are supported by a like pledge of the State. Moreover, aside from the strict applicability of constitutional principles, having in mind our form of government, we believe the integrity of the legislative branch to be such that a succeeding Legislature would not undertake to impair in any material fashion a solemn pledge made in good faith to bondholders by a predecessor Legislature." *Id.* at 29.

The Weintraub court's faith in the legislature was as misplaced as investors'.

To appellees repeal of the Covenant was "obviously an exercise of the police power . . ." (Ap. B. 81). To investors, repeal was just as obviously the fulfillment of a campaign pledge by a politician. Appellees discuss health, and environmental, and energy factors as though quoting from some detailed legislative history of repeal. No such history

exists. No hearings were held, no notice was given, no findings of fact were made. The Governor of New York said in effect that repeal was tragic, not some noble exercise of the police power. That there were energy problems and environmental problems and health problems at the time of repeal is not disputed. That they had any causal connection with repeal is an after-the-fact fabrication—a lawyer's brief, not legislative history.

Appellees' stated position is that for an exercise of the police power (i) no findings of fact or declarations of emergency are necessary (Ap. B. 81) and (ii) no emergency or declaration thereof need exist (Ap. B. 82). This argument is understandable, since if any emergency did prompt the repeal, it was not one of such importance that Governor Byrne thought to mention it in his message approving repeal. (A. 776-777).

Appellees discuss at length the Court's decisions in *Blaisdell* and *El Paso* (Ap. B. 83-88) but they are unwilling to have the case tested by the guidelines enunciated in *El Paso* (Ap. B. 88 fn. 56)—even though these are the very guidelines appellees say the lower courts should apply in contract clause adjudication.

Appellees conclude that no one understood the Covenant, that it was superfluous and redundant, and then say that only by repeal can hundreds of millions of pledged revenues and reserves be diverted to deficit rail mass transit.[18]

Appellees take issue again with Appellant's statement that: "no one disputes" that anything repeal can do the States can do "to the same extent" by putting up their own

18. Appellees conclude, without record citation or support, that "[o]btaining bondholder approval would be impossibly burdensome" (Ap. B. 97), but this is exactly what the Covenant contemplated, and there has been no legislative finding that approval would be difficult. Appellant, for example, holds almost $100 million of Consolidated Bonds, and until repeal institutional investors were the largest purchasers of Port Authority obligations.

money (Ap. B. 98). Yet appellees do not mention the only project to yet result from repeal (the PATH extension) and point out that the only effect which this litigation will have is to determine the amount of rent to be paid by the State.

The Constitutional Validity of the 1962 Covenant

Appellees had the candor in the New Jersey Supreme Court to label their arguments with respect to the constitutional validity of the Covenant as a cross-appeal from the superior court's decision, since the superior court did not pass on the point. They did not appeal to this Court but have simply relabeled their arguments and in effect seek to cross-appeal in their brief.[19] Viewing appellees' claims with respect to the constitutional validity of the Covenant in the same way that they viewed them in the courts below, this Court has already determined that it is without jurisdiction to hear their cross-appeal. *Gaby* v. *The Port of New York Authority*, 44 U.S.L.W. 3747 (1976)[20].

19. In appellees' New Jersey Supreme Court brief they followed the first paragraph on page 103 of their brief in this Court with the following statement: "Judge Gelman dismissed this *defense* because, having upheld the repeal legislation, he did not have to decide it. *We have appealed* because the Covenant's invalidity offers an alternative basis for upholding the constitutionality of repeal and for resolving the New York question discussed in Point V, *infra*. (At pp. 81-82.) (Emphasis added.)

20. Appellant dealt with the merits of the consent issue in its Motion to Dismiss Appeal in *Gaby* v. *The Port of New York Authority* dated June 7, 1976. The issue of superseding Federal law is frivolous; while appellees mention many acts of Congress, they cannot point to any statutory language which indicates, even indirectly, a Congressional desire to compel State action in the field of rail passenger transit. And even if they could the Covenant clearly effected the first financial involvement of the agency in deficit rail mass transit; it did not obstruct it.

CONCLUSION

The decision of the superior court should be reversed and the declaratory judgment sought by the Trust Company should be granted. The 1974 Legislation contravenes the Contract Clause of the United States Constitution and is a taking of bondholders' property without compensation in violation of the Due Process Clause. Chapter 25 of the Laws of New Jersey of 1974 is void.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

NEW YORK ATTORNEY GENERAL'S BRIEF AMICUS FOR THE STATE OF NEW YORK

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

NEW YORK ATTORNEY GENERAL'S BRIEF AMICUS FOR THE STATE OF NEW YORK

The Attorney General of the State of New York, pursuant to Rule 42 of the Rules of this Court, files this brief in support of the appellees' position. To avoid repetition, we endorse the essential arguments made by counsel for the appellees urging affirmance of the judgment of the Supreme Court of New Jersey, entered February 25, 1976. New York is concerned as to the disposition of this ap-

peal, particularly by reason of the fact that it has a companion statute (1974 Laws of New York, Ch. 993), to the statute (1974 Laws of New Jersey, Ch. 25) whose constitutionality the appellant challenges.

We oppose the suggestion made by the appellant in its jurisdictional statement and reiterated in its present brief (p. 3, fn. 2) that disposition of this appeal should be deferred pending final disposition of the related action in New York. The fact is that, although the appellant instituted a similar action in New York on June 17, 1974 to which prompt response was made by the New York Attorney General on July 7, 1974, that the appellant has failed since then to take any further steps to prosecute the New York action. Delay of the disposition of this appeal, to allow activation and final disposition of the New York action, would be unconscionable in the light of the appellant's failure until now to achieve any progress in the New York suit.

Moreover, completion of another lawsuit is not necessary, except for the further accumulation of lawyers' fees, to reiterate the principle that a State's police power can not be bargained away by any legislative body so as to preclude necessary action by a subsequent legislature. *Butchers Union Co.* v. *Crescent City Co.*, 111 U.S. 746, 750-751 (1884); *Pennsylvania Hospital* v. *Philadelphia*, 245 U.S. 20, 23 (1917); *Sanitary District* v. *United States*, 266 U.S. 405, 427 (1925). Our New York legislature is and has been governed by the doctrine that its police power is the least limitable of all the powers of government. *Matter of Engelsher* v. *Jacobs*, 5 N Y 2d 370, 373 (1959), cert. den. 360 U.S. 902 (1959); *Nettleton Co.* v. *Diamond*, 27 N Y 2d 182, 192 (1970), app. dism. *sub nom. Reptile Products Assn. Inc.* v. *Diamond*, 401 U.S. 969 (1971). The broad scope of New York's police power could not have been unknown to persons who allegedly depended upon the 1962 "covenant".

CONCLUSION

The judgment of the Supreme Court of the State of New Jersey, entered February 25, 1976, should be affirmed.

Dated: New York, New York
September 10, 1976

Respectfully submitted,

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

~~MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND~~ BRIEF *AMICUS CURIAE*

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August 12, 1976

IN THE

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OCTOBER TERM, 1975

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UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Securities Industry Association through its Public Finance Division hereby respectfully moves for leave to file the accompanying *amicus curiae* brief in the above-described action in support of the appeal herein by appellant, United States Trust Company of New York. The consent of counsel for the appellant has been obtained. The consent of counsel for the appellees was requested but counsel declined to consent "at this time." On June 28, 1976 this

Court granted the Securities Industry Association's motion for leave to file a brief *amicus curiae* in support of appellant's jurisdictional statement.

The interest of the Public Finance Division of the Securities Industry Association in this case arises from the fact that its members will be directly and substantially affected by the ultimate outcome of this litigation, as they have been already affected by the repeal of the statutory covenant enacted by the states of New Jersey and New York in 1962 which was for the benefit of holders of Consolidated Bonds of The Port Authority of New York and New Jersey ("1962 Covenant") and by the decision rendered in this case by the Superior Court of the State of New Jersey and affirmed by the Supreme Court of the State of New Jersey.

The Securities Industry Association is a trade association representing 650 securities firms whose members underwrite and deal in all types of securities including those of state and local governments, corporations and the federal government and its agencies. Its members constitute a broad cross-section of the securities industry—investment bankers, brokers, dealers, underwriters, and bond departments of banks, who participate in the financing of bonds and notes of states and local governments. The Public Finance Division of the Association has a vast wealth of collective experience in, familiarity with, and expertise with respect to the securities market for obligations of state and local governments, a unique market.

The Public Finance Division is confident that appellant will adequately present the importance to holders of Consolidated Bonds of the Port Authority of this Court's decision on the constitutionality of repeal of the 1962 Covenant. However, the Public Finance Division is singularly able to present facts concerning the impact of the decision on the constitutionality of the repeal on the municipal bond mar-

ket generally, on the borrowing ability of state and local governments for whom Public Finance Division members act as investment bankers and financial advisors, and on the general investing public. The Public Finance Division respectfully submits that the general importance of the questions presented to this Court requires that such facts be presented by the Securities Industry Association through its Public Finance Division as *amicus curiae.*

August 12, 1976

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF *AMICUS CURIAE*

The Securities Industry Association, through its Public Finance Division, respectfully submits this brief in support of the appeal to this Court by appellant United States Trust Company of New York, from the judgment of the Supreme Court of New Jersey, entered February 25, 1976, affirming the decision of the Superior Court of New Jersey, Bergen County, which upheld the constitutionality of Chapter 25 of the Laws of New Jersey of 1974 which retroac-

tively abrogated a valid statutory covenant between the states of New Jersey and New York and bondholders of The Port Authority of New York and New Jersey ("Port Authority") securing such Port Authority bonds in the principal amount of $1.26 billion (such statutory covenant is hereinafter referred to as the "1962 Covenant").

Interest of Amicus Curiae

The Securities Industry Association is a trade association representing 650 securities firms whose members underwrite and deal in all types of securities including those of state and local governments, corporations and the federal government and its agencies. Its members constitute a broad cross-section of the securities industry—investment bankers, brokers, dealers, underwriters, and bond departments of banks, who participate in the financing of bonds and notes of states and local governments. Members of the Securities Industry Association underwrite more than ninety-five per cent of all long-term debt of states and local governments.

The state and local government securities market, commonly called the municipal securities market, represents approximately 39% of the net new funds raised each year in the United States capital markets (excluding the federal government and its agencies). The municipal securities market is one of the fastest growing sectors of the United States capital market. The volume of state and local government financing has increased dramatically since 1960 from an annual level of $11.5 billion in 1960 to $60 billion by 1975. As a result, total outstanding indebtedness of state and local governments grew from $71 billion at the end of 1960 to $222.8 billion by the end of 1975. The proceeds of long-term bonds issued by state and local governments were applied for the following purposes:

(Billions of Dollars)

Purpose	1960	1970	1972	1974	1975
Education	2.28	5.03	4.98	4.73	4.70
Transportation	1.31	3.17	2.99	1.71	2.20
Utilities and conservation	1.30	3.47	4.68	5.64	7.30
Water and sewer	1.02	2.40	2.45	1.99	2.30
Pollution control			.60	1.71	2.20
Other utility and cons.	.28	1.07	1.64	1.94	2.70
Social welfare	.60	1.47	3.82	4.45	4.60
Public housing	.43	.13	1.92	1.69	.70
Hospitals	NA	NA	.50	.78	2.0
Other	.17	1.30	1.41	1.98	1.80
Industrial aid	.04	.11	.33	.50	.50
Others (general purpose)	1.53	4.20	5.30	6.50	10.0
New capital	7.06	18.00	22.12	23.51	29.6
Refunding	.05	.11	1.57	.73	1.00
Total	7.11	18.11	23.69	24.24	30.6

The ownership of holdings is reflected in the following table:

(Billions of Dollars)

	1950		1960		1970		1975	
	Amount	Percent of Total	Amount	Percent of Total	Amount	Percent of Total	Amount	Percent of Total
Banks	8.2	32.6	17.7	25.0	70.2	48.0	102.8	46.1
Individuals	10.0	39.6	30.8	43.5	47.4	32.5	67.5	30.3
Fire & Casualty Insurance	1.1	4.4	8.1	11.5	17.8	12.2	34.3	15.4
Others	5.9	23.4	14.2	20.0	10.8	7.3	18.2	8.2
Total	25.2	100	70.8	100	146.2	100	222.8	100

Source: Federal Reserve Board of Governors.

The Securities Industry Association considers it of vital importance that this Court consider the potentially disastrous consequences to the public interest that could result if the repeal of the 1962 Covenant is upheld—namely, the consequent lessening of the ability of state and local governments to obtain access to the credit markets.

The problems presented are exacerbated by two additional considerations: (1) the demand for obligations of state and local governments has become extremely volatile because the major institutional investors on whom the

market relies for support are particularly subject to the pressures of monetary policy, the impact of inflation and sudden changes in portfolio policies; and (2) assuming the validity of the repeal, it is doubtful that the capital markets will have the capacity to absorb desired levels of state and local borrowing at rates of interest that state and local governments are willing to pay. See, Joint Economic Committee, 94th Cong., 20 Sess., Changing Conditions In The Market For State and Local Government Debt, (Joint Comm. Print 1976); see also, Staff of Subcommittee on Economic Progress of the Joint Economic Committee, 89th Cong., 20 Sess., State and Local Public Facility Needs and Financing (Joint Comm. Print 1966).

A holding that the repeal legislation is valid would severely limit, if not foreclose, the access of municipal borrowers to the capital market—with the ultimate result that public interests could not be served, since capital needs of municipal issuers could not be fulfilled.

SUMMARY OF ARGUMENT

The repeal of the 1962 Covenant jeopardizes the foundation of municipal credit generally and thus is in derogation of the paramount public interest in protecting the borrowing power and credit of state and local governmental units. Accordingly, the repeal legislation cannot be upheld as a valid exercise of the state's police power since the legislation itself threatens the ability of the states to accomplish their public purposes.

Furthermore, this Court has consistently held that in response to an emergency a state may only impair such contractual obligations which, in themselves, either directly contribute to the emergency or prevent its solution. Since the continued existence of the 1962 Covenant neither contributed to nor precluded a solution of the mass transit problem, its repeal cannot be justified as an exercise of the state's police power.

ARGUMENT

I.

The Repeal of the 1962 Covenant Jeopardizes the Foundation of Municipal Credit Generally and is Thus in Derogation of the Paramount Public Interest in Protecting the Borrowing Power and Credit of State and Local Governmental Units.

In explaining the necessity for states to retain certain limited power to meet dire emergencies in the public interest, the exercise of which would result in the impairment of contractual obligations, this Court in *Home Bldg. & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398 (1934) noted that "the policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile—a government which retains adequate authority to secure the peace and good order of society." Id at 435. If the challenged legislation enacted under the guise of a state's police power has the effect of creating an emergency even greater than that sought to be cured by the legislation, that legislation would be antithetical to the very premise upon which the residuum of state power is based. That is to say, if the challenged legislation itself—rather than the emergency it purports to cure—threatens the "maintenance of a government by virtue of which contractual relations are worthwhile", then clearly such challenged legislation cannot be upheld as a valid exercise of the state's police power.

The legislation repealing the 1962 covenant, if upheld by this Court, will have just such an adverse effect in that it poses a real and substantial threat to the foundation of municipal credit generally and the continued viability of municipal bonds as an acceptable investment able to compete in credit markets with other credit instruments.

The financing of obligations of state and local governments is based upon reliance by prospective purchasers on the security of and source of payment for the obligations.* Assurance of payment and continuation of the inviolability of the security for such payment are essential to a proper functioning of the market for such obligations. In turn, the continuation of an effective operation of state and local governments is dependent upon such governments' access to capital markets. Such access is dependent upon the continued integrity of the security and source of payment of such obligations, as well as the integrity of the pledges and contractual undertakings made with respect to such obligations.

In *Perry* v. *United States*, 294 U.S. 330 (1934) this Court recognized that an obligation to secure and repay a loan is among the most sacrosanct of obligations when the borrower is a sovereign:

> "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the

* Obligations of state and local government are generally of two types: general obligations and revenue obligations. General obligations are secured by the issuer's pledge of its full faith, credit and taxing power. Revenue obligations are payable from revenues derived from tolls, charges or rents paid by those who use the facilities constructed with the proceeds derived from the sale of the obligations or other facilities owned by the issuer of the obligations (such as the Consolidated Bonds of the Port Authority). General obligations and revenue obligations are seldom, if ever, secured by mortgages on the issuer's property. As stated in *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U.S. 502, 509 (1942): "The principal asset of a municipality is its taxing power and that, unlike an asset of a private corporation, cannot be available for distribution. An unsecured municipal security is therefore merely a draft on the good faith of a municipality in exercising its taxing power".

Thus, because the property of state and local governments is generally exempt from levy and execution, greater emphasis must be given to their promises, their contracts, their covenants to assure their acceptability in the credit markets.

> Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers."
>
> • • •
>
> "By virtue of the power to borrow money 'on the credit of the United States,' the Congress is authorized to pledge that credit as an assurance of payment as stipulated,—as the highest assurance the Government can give, its plighted faith.
>
> • • •
>
> ". . . The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government,—upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations." *Id.* at 350-351, 351, 353.

Thus, this Court held in *Perry* that the United States, as a sovereign borrower, could not withdraw its "plighted faith" pledged in order to induce private lenders to loan it money, even under emergency conditions such as prevailed during the depression.

The basis for the decision in *Perry* was this Court's recognition of the paramount public interest in protecting the credit of governmental units. For if by reason of a repudiation of its "plighted faith" a governmental unit is denied access to the credit markets and is thus deprived of its economic power to borrow money on its credit—"a power vital to the Government,—upon which in an extremity its very life may depend" (*Id.* at 353)—then the continued viability of such government would be threatened. In such a situation the governmental unit may have

solved a problem only to find that by so doing it has rendered itself helpless to effectively deal with any real emergency—and indeed may have prompted financial emergencies by the manner in which it solved the problem.

The sanctity of municipal bond obligations, even in the face of economic crises, was recognized by this Court in a series of post Civil War decisions. *E.g., Von Hoffman* v. *City of Quincy,* 71 U.S. (4 Wall) 535 (1866); *Wolff* v. *City of New Orleans,* 103 U.S. 358 (1880); *Louisiana* v.*Pilsbury,* 105 U.S. 278 (1881). In striking down the remedial legislation and affording protection to bondholders, this Court was pursuing what it perceived as a paramount goal—inducing investor confidence in municipal obligations notnotwithstanding dire economic reverses of the issuer. The Court recognized the need for such assurance in view of the unique nature of municipal obligations.

Municipal obligations often remain outstanding for many years, through changes of administrations and composition of legislative bodies of governmental issuers. In view of the fact that alterations in the obligations may be sought as a result of changes in leadership and policy, investors *must* be assured of the inviolability of the duties imposed by their bond contracts. Such assurance enables municipal issuers to borrow capital at reasonable interest rates. Such assurance, upon which investment in municipal obligations is based, is founded upon (1) the rule that the statutes under which bonds are issued are an integral part of the bond contract and (2) the provision in Article I Section 10 of the United States Constitution that "No State shall . . pass any . . . Law impairing the Obligation of Contracts. . . ."

The 1962 Covenant was enacted as a direct result of, and as a specific response to, concern in the investment community that the assumption by the Port Authority of the deficit-ridden Hudson and Manhattan Railroad ("H&M"), now PATH, would set a precedent for the assumption by the Port Authority of other perpetual deficit projects. The 1962 Covenant, which was described by the Farley committee as a "constitutionally-protected statutory covenant" (ST 184),* allayed such investor concern** and following its enactment $1.26 billion of Port Atuhority bonds were purchased.*** The most distinctive aspect of the repeal of the 1962 Covenant, and the reason it will have such a devastating effect on investor confidence and municipal credit if upheld by this Court, is that the 1962 Covenant was the two states' *specific* and *single* response to investor concern

* "ST" references are to pages of the Stipulation among counsel before the Superior Court, dated December 20, 1974. "T" references are to pages of the Trial Transcript before the Superior Court; and "P" references are to plaintiff United States Trust Company of New York's trial exhibits.

** Since the enactment of the 1962 covenant, the Port Authority has emphasized the importance of the Covenant to induce potential investors to purchase Consolidated Bonds. The Covenant was described as a legally enforceable contract (T58-1 to 59-11; P-36, P-38), was discussed in detail in every official statement of the Port Authority distributed in connection with the sale of Consolidated Bonds since 1962 and was discussed at information sessions held in connection with the sale of Consolidated Bonds of the Port Authority (T6 -20 to 64-16, P1, P2, ST 330-335).

*** The salient point in the instant case is that the 1962 Covenant was "a substantial inducement" to buyers of Port Authority bonds. In *City of El Paso* v. *Simmons,* 379 U.S. 497 (1965), so heavily relied upon by the New Jersey Superior Court, the unlimited right in perpetuity to reinstatement of a forfeited contract to buy land was never bargained for by any buyer. As this Court said the buyers in *El Paso* could not, and did not, expect the unlimited right of reinstatement to be of "everlasting effect" (*Id.* at 514). The 1962 Covenant was *limited* to the life of the bonds. The statute in *El Paso* was a remedial statute of repose to alleviate an unforeseen and unexpected development. In contrast, the repeal legislation in the instant case repudiates a pledge made for the precise purpose of allaying the fear of bond buyers who *foresaw* that the states might seek to alleviate the then existing crisis in mass transportation by siphoning off Port Authority funds into ever expanding deficit operations.

prompted by the proposed takeover by the Port Authority of the deficit ridden H&M. This fact distinguishes this case from all other impairment cases which this Court has decided. The record below abounds with evidence that the Port Authority could not take over the H&M and continue to market its bonds at reasonable rates, if at all—except upon passage of the 1962 Covenant (ST 74, 76-77, 147, 165, 178, 179, 182, 183, 184). The Superior Court acknowledged that the 1962 New Jersey Legislature had itself reached this conclusion:

> "[T]he fact of the matter is that the Legislature of 1962 concluded it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority." *United States Trust Company of New York* v. *The State of New Jersey,* 134 N.J. Super 124, 178, 338 A.2d 833, 863-64 (Law Division 1975)

In short, the bondholders have been misled;* they purchased the bonds at the prices offered because of the existence of the Covenant and either would not have purchased the bonds at all without the Covenant or would have purchased them only at a substantially lower price. Thus, at the hearing before the Superior Court, Mr. Gordon Fowler,

---

* Mr. Lester Murphy, a Vice President of Barr Brothers & Co. Inc., one of the largest dealers in Port Authority bonds, testified as follows:

> "Q. Is the fear then that by the repeal of the covenant the Port Authority now is going to suddenly completely enwrapped in mass transit? A. No, I think that the fears, I think I've previously testified to, is that it's a—it's an abrogation of an agreement, it's a contract. It's as if I went and bought a car from General Motors and had a twelve month warranty, and all of a sudden they announced that it's only good for six months. I don't think that I'd buy another General Motors car. And I think this is the feeling in the investment community." (T 435)

Secretary of Connecticut General Life Insurance Company, testified as follows:

> "Q. In your purchases between 1968 [and] 1973 [in] the secondary market, were you aware of the existence of the 1962 covenant? A. Yes, I was.
>
> Q. Did the existence of the covenant affect your decisions to purchase those bonds? A. I relied on it at the time I purchased the bonds, yes".
>
> • • •
>
> Q. With respect to all the purchases you described [approximately $9½ million of Port Authority bonds], would you have purchased any of those bonds without the protection of the covenant? A. I can't say for certain we would not have purchased them, but if we had, it would have been at a much lower price for the given coupons" (T765).

Mr. John F. Thompson, an eminent investment banker and municipal analyst and Vice President of W. H. Morton & Co., gave similar testimony:

> "Q. And did you personally look to the covenant and depend on it? A. Oh, certainly. That was—certainly was an important and significant part of what I presumed we were buying for our clients when we purchased those bonds that I speak of.
>
> Q. Which were those, just to make sure its clarified? A. This is when I was at [Scudder, Stevens & Clark, a major financial advisor] and there were at least two instances where we purchased Port Authority bonds for several clients. In each instance, the total amount was at least a million dollars of bonds" (T82).
>
> Q. Assuming everything else to be equal, but if the covenant had not been enacted would those purchases have been made?
>
> • • •
>
> "The Court: Well, would you have recommended, then, the purchase of the bonds?

The Witness: I would not have recommended them at the price which they were then offered" (T83).

• • •

Q. If you knew that the covenant would later be repealed would you have recommended the Port Authority bonds during the '60s? A. No." (T86).

The reason why investors would not have purchased Port Authority bonds without the Covenant, or only at substantially lower prices, was further explained in a law review article entitled "The Contract Clause as the Guardian Against Legislative Impairment of Municipal Bondholder's Rights":

> "A bond investor is willing to take a relatively fixed risk in exchange for a fixed return. The type of risk is then utilized in determining the amount of interest he will require for the use of his capital. The 1962 covenant was enacted in order to attract large sums of capital by setting limits on the risk which the Port Authority could undertake in the precarious area of deficit rail operations. Since the Port Authority lacks the power to tax or to pledge the credit of either State the covenant was designed to protect the only source for payment of expenses and over $1 billion in bond obligations—the Authority's revenues." 6 SETON HALL L. REV. 48, 78 (1974).

The Superior Court itself recognized that the price paid and the interest rate fixed for such bonds reflects the investor's evaluation of the underlying security of the issue, and that purchasers of Port Authority Consolidated Bonds after enactment of the Covenant relied on the Covenant in purchasing such bonds at the prices they paid:

> "Port Authority consolidated bonds are known in the market place as revenue bonds, *i.e.*, they are payable solely from the revenues and reserve funds derived

from the facilities operated by the Authority. In the main these bonds are sold to relatively sophisticated institutional investors either for their own accounts or for the accounts of others whose investment funds they manage. Since the bonds carry a fixed rate of return and must compete against other similar types of securities available in the market place, the interest rate fixed when the bonds are initially marketed, as well as the price of the bonds in the secondary market, will normally reflect the investor's evaluation of the underlying security of his investment and the prevailing interest rates available on similar types of securities."

• • •

"Based upon the testimony offered by plaintiff, the investment community's understanding of the covenant was that it in some manner furnished 'security for the bondholders and it protected the diversion of the earnings of the Port Authority into deficit mass rail transit.' If the covenant is to be understood in that sense, the record supports plaintiff's claim that investors relied on the covenant in purchasing Authority bonds." *United States Trust Company of New York* v. *The State of New Jersey, supra,* 134 N.J. Super at 177, 179, 338 A.2d at 863, 864.

In light of the repudiation of their "solemn pledge", it cannot be seriously disputed that the credit worthiness of New Jersey, New York, and their political subdivisions has been and will continue to be impaired to such a degree that the very ability of these entities to raise capital at reasonable rates is endangered. At the hearing Mr. Thompson testified (a) that if the Governor of New Jersey had recommended repeal of the Covenant *before* the sale of $300,000,000 of bonds of the New Jersey Sports and Exposition Authority instead of one week *after* the sale, the bonds would not have been saleable, and (b) that many institutional investors now refuse to purchase *any* obligations of

New Jersey or New York or their political subdivisions because of the repeal:

> "In my opinion—and I have heard no professional investment person who disagreed with this; in my opinion if that recommendation by the Governor had been made one week before the sale of the Sports Complex bonds instead of one week after, the bonds would not have been saleable; because the investment community was saying about the repeal of the covenant, and has said about it: If a legal covenant can be repealed by the States, what confidence can we place in their moral obligation?
>
> "We have run into this in an even broader field. My firm was the number two manager in a syndicate which last week underwrote $150 million and sold them of Power Authority bonds of the State of New York.
>
> "Now the Power Authority is not dependent upon a moral obligation. It is dependent on its own revenues which are from the sale of electric power. It is about as far removed from any emotional, or as far removed from the feeling I just stated as anything could be. And yet we found in several parts of the country that there were many institutional investor portfolio managers who had themselves adopted or their investment committees had adopted a rule that there be no further investment in anything in New York State or New Jersey due to the repeal of the Covenant." (T87).

The serious adverse effect repeal of the Covenant had on the credit of New York State and its agencies was described in the Report to the Governor issued by the New York State Moreland Act Commission on the Urban Development Corporation and Other State Financing Agencies.

> "Since early 1975, the State has had to rely on emergency measures to keep several agencies and the largest city in the nation from default. Financial markets have been either closed to the State and its authorities or are demanding premium interest rates for all government sponsored capital projects, even those for financially sound communities."

• • •

> "One factor contributing to New York's 1975 bond market problems was the 1974 repeal of a covenant of the Port Authority of New York and New Jersey which had restricted the use of excess funds for mass transit. The transfer of excess funds to other purposes must be done only in accordance with understandings in effect at the time bonds are sold, in order to protect the State's credit and keep faith with bondholders."

• • •

> "The financing programs of the Dormitory Authority, Port Authority and Power Authority, although they consist largely of straight revenue bonds, clearly affect the State's credit. Their aggregate borrowings are substantial, and there are a number of indirect relationships between their operations and the State's finances. Moreover, their operations can occasion disputes, as exemplified by the Port Authority bond covenant, that can directly affect the State's financial credibility."

• • •

"An example of market reaction is found in an October 18, 1974 letter from the Fireman's Fund American Insurance Companies to Mr. Belica. Noting that the Fireman's Fund had approximately $165 million par value New York State, HFA and Port Authority bonds in its portfolio, the writer stated:

> 'The abrogation of this covenant without consent or compensation, I believe, is not only illegal, but shortsighted. You are aware that credit rests not only on covenants between borrower and issuer, but also importantly on trust. With this action, the bond holder's faith in New York State has been

shaken resulting in high interest rates and poor investor acceptance as subsequent sales by New York State agencies and authorities have shown. It is my belief that the best way to begin to reestablish investment confidence is a court overturn of this legislation with publicly stated approval from State officials.'" Moreland Act Commission [New York State] on the Urban Development Corporation and Other State Financing Agencies, "Restoring Credit and Confidence: A Reform Program for New York State and Its Public Authorities" (New York, 1976), pp. 9, 24, 100, 163.

The view as to the adverse effect repeal has had on the credit of the two states and their subdivisions was echoed in the above-mentioned law review article:

"The New York and New Jersey legislatures, in repealing the 1962 covenant, have impaired a constitutionally protected obligation. The practical repercussions of this repudiation—not of a moral pledge but of a solemn legal pledge—were recently noted in *Moody's Bond Survey:*

'What does the repeal of a legal obligation, the basis for the Port Authority's covenants, imply with respect to moral obligations? If the States are willing to repeal a legal obligation used as the basis for selling bonds without regard for possible litigation and uncertainty, what chance does a moral obligation have in a period when sufficient political pressures arise? Or, to phrase another question: When or under what circumstances would a State legislature find it expedient not to make a contribution to a capital reserve fund? The answer, if the Port Authority example provides one, is when it may be politically expedient.'

The repeal of the covenant, if *Moody's* is an indication, has already significantly undermined investor confidence in the trust-worthiness of the two states.

This erosion can result in higher interest rates for New Jersey's public authorities and agencies seeking to finance their public projects. Is this a price worth paying—especially when repeal of the covenant does not insure that the Port Authority will, in fact, be able to undertake any additional deficit rail operations? The confidence of the banking and investment community in the two states would be restored by a clear judicial expression that the repeal of the 1962 covenant violates the impairment of contracts clause, is not a proper exercise of police power, and, therefore, is unconstitutional." 6 SETON HALL L. REV. at 80-81.

Investors who purchase long-term municipal obligations want and need to be assured that the issuer's contractual obligations won't be impaired for any reason, and certainly want to be assured that such obligations are not subject to "political risks". As set forth above, this Court has traditionally recognized the unique nature of such obligations and the importance of assuring investors of the inviolability of the pledges of a government unit's "plighted faith." The repeal of the 1962 Covenant was an act of political expediency and the investment community recognized it as such. Under any circumstances that act could not be justified as a valid exercise of the state's police power and certainly cannot justify an abrogation of a covenant in a municipal debt obligation which was enacted for the very purpose of inducing investors to purchase the obligations in reliance on the Covenant. If this Court were to uphold the repeal of the 1962 Covenant, the future of municipal bonds would be seriously jeopardized because vulnerability to political pressures is the opposite of the certainty and stability which prudent investors require.

II

The Continued Existence of the 1962 Covenant did not Preclude a Solution to the Transit, Energy and Pollution Problems and Therefore Its Repeal Cannot be Justified as an Exercise of the State's Police Power

The common thread in the cases in which this Court has upheld an impairment is the fact that the obligation impaired actually directly contributed to the emergency or prevented its solution. In the instant case, however, the 1962 Covenant did not directly contribute to the transit, energy and pollution problems, nor did it prevent their solution. Accordingly, the repeal of the 1962 Covenant cannot be justified as an exercise of the state's police power.

The key passage in this Court's lengthy opinion in *Home Bldg. and Loan Ass'n.* v. *Blaisdell, supra,* is the following:

> "The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. Another argument, which comes more closely to the point, is that the state power may be addressed directly to the prevention of the enforcement of contracts *only when* these are of a sort which the legislature in its discretion may denounce as being *in themselves* hostile to public morals, or public health, safety or welfare, or where the prohibition is merely of injurious practices; *that interference with the enforcement of other and valid contracts according to appropriate legal procedure, although the interference is temporary and for a public purpose, is not permissible.* This is but to contend that in the latter case the end is not legitimate in the view that it cannot be reconciled

> with a fair interpretation of the constitutional provision." 290 U.S. at 438-39 (emphasis added).

In *Blaisdell* the contractual right to foreclose and evict during an emergency contributed directly to the emergency and such emergency could not be solved without the temporary modification of that right. If the right of foreclosure were not temporarily suspended, the mortgagees would have been deprived of their equity for all time. Thus, the Court held that the State could validly exercise its police power to restrain temporarily the enforceability of a contractual obligation "where vital public interests would *otherwise* suffer. . . ." *Id.* at 440 (emphasis added). This Court was faced with a similar situation in *Block* v. *Hirsch,* 256 U.S. 134 (1921) when it upheld a temporary suspension of landlords' rights to regain possession after lease expirations in view of the scarcity of housing in the District of Columbia after the war. In both cases the impairment was a necessary and essential means of averting the threatened injury. Likewise, in *W. B. Worthen Co.* v. *Kavanaugh,* 295 U.S. 56, 63 (1935), this Court noted the requirement for establishing the *necessity* of the impairment as a means of averting the threatened harm, and in *East New York Savings Bank* v. *Hahn,* 326 U.S. 230, 234 (1945) this Court noted the significance of a legislative finding that the public welfare *required* the impairment. Finally, in *City of El Paso* v. *Simmons, supra,* the Court noted that the imposition of a five year statute of repose was "quite clearly necessary" in order to avert the public injury. 379 U.S. at 516.

The law review article referred to above draws the same distinction:

> "The Supreme Court [in *W. B. Worthen Co.* v. *Kavanaugh,* 295 U.S. 56 (1935)] has indicated that the courts are loath to accept modifications of bondholders' rights, even if an economic crisis exists. In

fact, legislative impairment of bondholders' rights because of the economic crisis has been permitted only when *any other result* would lead to total fiscal collapse of the bond issuer and the impossibility of payment of the bonds. *Such is not the case of the Port Authority. Any emergency which may exist in the field of mass transit is not caused by the covenant, might or might not be alleviated by its repeal, and certainly may be solved by other, constitutionally inoffensive methods.*" 6 SETON HALL L. REV. at 85 (emphasis added).

That it was unnecessary to repeal the 1962 Covenant in order to deal with the mass transit problem was recognized by the Court in *Kheel* v. *The Port of New York Authority,* 331 F.Supp. 118, 122 (S.D.N.Y. 1971), aff'd, 457 F.2d 46 (2d Cir.), cert. denied, 409 U.S. 983 (1972):

> "• • • from a pragmatic point of view, the transit amendment's [1962 Covenant's] constraint upon non-self-supporting rail facilities does not even temporarily preclude the state legislatures from dealing with mass transit problems by other means, e.g. by enactment of subsidy programs."

In the instant case the 1962 Covenant did not directly contribute to the transit, energy or pollution problems; nor did the Covenant prevent a solution to these problems. The *most* that can be said for repeal is that it *might possibly* free-up certain moneys (insignificant sums in comparison to the mass transit problem) for improvements in mass transit facilities and that such improvements *could* lead to the use of less automobiles in the Port District which would, in turn, result in some diminution of fuel consumption and automobile emissions. Clearly, however, such a tenuous connection with the alleged "emergencies" cannot meet the constitutional test, as stated in *Blaisdell,* that contracts may be impaired only when they are

"in themselves hostile to public morals, or public health, safety or welfare. . . ." 290 U.S. at 438. Moreover, since there are other, more effective and constitutionally inoffensive methods to solve these alleged "emergencies" it cannot be said, as required by *Blaisdell,* that but for the impairment "vital public interests would otherwise suffer. . . ." *Id.* at 440.

Conclusion

No one can predict the extent of the negative impact of upholding the repeal of the 1962 Covenant upon the future financing of public corporations which have no recourse to the taxing power; but it is safe to predict that, though yesterday's unqualified pledge may seem today to some to have been improvident, to equivocate now on the meaning and significance of that pledge would be more improvident. Private capital, not money raised by taxation, made the bridges, tunnels, and port improvements of the Port Authority possible. A decision that the reserved power of states does not supersede the Contract Clause will go a long way towards protecting and preserving the credit of these states and their political subdivisions for posterity.

The 1974 legislation purporting to repeal the 1962 Covenant made by the states of New York and New Jersey to holders of Consolidated bonds of the Port Authority violates the Contract Clause of the Federal Constitution and should be declared void.

Respectfully submitted,

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Of Counsel:

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August 12, 1976

MOTION FILED
NOV 8 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for the Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE REPLY BRIEF *AMICUS CURIAE* AND REPLY BRIEF *AMICUS CURIAE*

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November 5, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for the Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE REPLY BRIEF *AMICUS CURIAE*

The Securities Industry Association respectfully moves for leave to file the accompanying reply brief *amicus curiae* in the above-described action in response to the brief filed by appellees, The State of New Jersey, et al., and in further support of the appeal to this Court by appellant United States Trust Company of New York. Counsel for appellant and counsel for appellees have consented to the filing of a reply brief by the Securities Industry Association as *amicus curiae*.

The Securities Industry Association ("SIA"), through its Public Finance Division, has sought to file briefs as *amicus curiae* in this appeal on the ground, *inter alia,* that its vast wealth of collective experience in and expertise with respect to the municipal bond market made it singularly able to present facts relevant to and analyze arguments raised in this appeal.

On June 28, 1976 this Court granted SIA's motion for leave to file a brief *amicus curiae* in support of appellant's jurisdictional statement. On August 12, 1976 the SIA filed a brief *amicus curiae* herein on the merits with the consent of counsel for appellant and counsel for appellees. On November 5, 1976 the accompanying reply brief *amicus curiae* was timely submitted for filing along with the requisite consent of counsel for appellant and counsel for appellees, but was rejected by the Clerk of the Court.

The SIA makes this motion to file the accompanying reply brief *amicus curiae* on the grounds that such brief analyzes facts and questions of law not adequately presented by the parties in any of their briefs and that such brief was timely filed with the requisite consents pursuant to the advice of one of the assistant clerks of this Court.

I

There are Compelling Reasons Why *Amicus* Should be Permitted to Reply to Certain Arguments Raised For The First Time by Appellees.

The Brief for Appellees ("App. Br.") raises certain new arguments to which apellant has not responded, principally because appellant views the issues from a somewhat different perspective than that of *amicus.*

Thus, in the accompanying reply brief *amicus* makes the following points which have not been made by either of the parties in their briefs:

1. Appellees argue that the 1962 Covenant was superfluous because other bondholder protections were adequate, particularly the Section 7 certification requirement (App. Br. 92-95). This argument, however, is completely refuted by the undisputed fact that the Commissioners of The Port Authority of New York and New Jersey ("Port Authority") were able to make a Section 7 certification in connection with the takeover of the Hudson and Manhattan Railroad (now PATH), *only* by projecting that PATH's annual operating deficits would level off at approximtely $6,575,000 per year*, *which amount turned out to be only one-fifth of the actual present operating deficits of PATH.* (See accompanying reply brief of *amicus,* page 8, note 5, *supra.*) Obviously, without the 1962 Covenant the Port Authority would be free to take on or build another rail mass transit facility by making a Section 7 certification based on projected deficits which, even if made in good faith, with the erroneous PATH projections used as an example, will inevitably turn out to be a fraction of the actual annual deficits in the future. In such an event none of the other bondholder protections so heavily relied on by appellees, including the Section 7 certification, the 1.3 test and Section 12(f), would protect Port Authority bondholders from the acquisition of another rail mass transit facility with the perpetual, staggering and ever increasing deficits which characterize rail mass transit projects. (See accompanying reply brief of *amicus,* pages 9-11.)

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* "The Commissioners' 1962 certification made with respect to the acquisition of the PATH System was made on the basis of an opinion of A. Gerdes Kuhbach, the Director of Finance of the Port Authority, which was prepared at the request of the Commissioners. His opinion analyzed and reviewed the financial aspects and data relating to the proposed acquisition, rehabilitation and operation of the PATH System. *He concluded that the Section 7 certification could be made since the anticipated net loss after debt service for the years 1969 through 1991 would level off at approximately $6,575,000 per year, an amount that would not impair the sound credit rating of the Port Authority."* (Appendix p. 677; Stipulation among counsel dated December 20, 1974, p. 209. (emphasis added.))

2. Appellees' novel argument that a state may impair a contractual obligation under the guise of its police power *even in the absence of an emergency* (App. Br. 82-83), is refuted by a long line of Contract Clause decision of this Court, and is unsupported by the two decisions of this Court relied upon by appellees. (See accompanying reply brief of *amicus,* pp. 16-20, *infra.*)

3. No emergency existed sufficient to justify the impairment of the contract with Port Authority bondholders (see accompanying reply brief of *amicus,* pp. 20-22); and judicial deference ordinarily afforded legislative determinations is inappropriate in cases such as the one before this Court (id. at 22-23).

II

The Accompanying Reply Brief Was Properly Submitted on November 5, 1976.

The accompanying reply brief *amicus curiae* was timely submitted for filing along with the requisite consents of counsel on Friday, November 5, 1976, but was rejected by the Clerk of the Court.

Counsel for *amicus* submits that the brief was properly filed and should have been accepted. Rule 42 of the Revised Rules of this Court, as amended to November 15, 1975, provides in pertinent part:

> "2. A brief of an *amicus cruiae* in cases before the court on the merits may be filed only after order of the court or when accompanied by written consent of all parties to the case and presented within the time allowed for the filing of the brief of the party supported."

Amicus filed its reply brief and written consents in conformity with the rule on November 5, 1976, the date by which appellant was required to file its reply brief. Counsel

respectfully submits that a reply brief is a "brief" within the meaning of Rule 42.

Howard F. Husum, Esq., associated with counsel for *amicus,* called the office of the Clerk of the Court on November 1, 1976, and was advised that the procedure for filing a *reply* brief *amicus curiae* was the same as for filing an initial brief—by motion or on consent of counsel. (See the affidavit of Howard F. Husum, Esq., sworn to on November 8, 1976, annexed hereto as Exhibit "A.") However, on November 5, 1976, the Clerk of the Court called counsel for *amicus* and advised that its reply brief was being rejected on the ground that the rules of this Court do not provide for the filing of reply briefs by anyone other than the parties.

There is absolutely no indication in the Rules of this Court that reply briefs may be filed only by the parties. Rule 40 provides in pertinent part:

> "4. Reply briefs shall conform to such portions of this rule as are applicable to the briefs of an appellee or respondent, but need not contain a summary of argument, regardless of their length, if appropriately divided by topical headings."

While it is understandable why this Court would seek to discourage the filing of reply briefs by *amicus,* thus avoiding a proliferation of redundant briefs, it is respectfully urged that the accompanying reply brief of *amicus* should be accepted by this Court in that it contains an analysis of certain key issues not discussed by the parties in their brief and would thus be of assistance to this Court in reaching its decision. The acceptance of the accompanying brief is also urged on the additional, albeit less compelling ground that counsel for *amicus* expended the effort and expense of preparing such brief in reliance on the advice obtained from the office of the Clerk of the Court.

Filing of the accompanying reply brief today cannot work any prejudice on the parties for the reason that copies of said brief were mailed and hand delivered to them on Friday, November 5, 1976, and counsel for all parties have consented to the filing of a reply brief by *amicus*.

Respectfully submitted,

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Of Counsel:

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HOWARD F. HUSUM
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November 8, 1976

EXHIBIT "A"

Affidavit of Howard F. Husum

HOWARD F. HUSUM, being duly sworn, deposes and says that he is associated with Hawkins, Delafield & Wood, counsel to the Security Industry Association and fully familiar with the facts and proceedings heretofore had herein.

1. This affidavit is submitted in connection with the accompanying motion for leave to file a reply brief *amicus curiae*.

2. On November 1, 1976, your deponent called the Office of the Clerk of the Supreme Court of the United States and asked to speak to Mr. Michael Rodak, Jr., the Clerk of the Court, in regard to the filing of a reply brief *amicus curiae* by the Securities Industry Association in the "Port Authority" case.

3. Your deponent was connected with someone he assumed was Mr. Rodak. However, snice Mr. Rodak has advised your deponent that he did not participate in any such conversation, your deponent must have been speaking to one of Mr. Rodak's male assistants. This individual confirmed that a reply brief could be filed by *amicus*, stating that since the Rules of the Court were silent on the point the procedure for filing a reply brief *amicus curiae* was the same as that for filing an initial brief *amicus curiae* —by motion or on oconsent of the parties.

HOWARD F. HUSUM

Howard F. Husum

Sworn to before me this
8th day of November, 1976

DOROTHY M. FALLEO

Notary Public

DOROTHY M. FALLEO
Notary Public State of New York
No. 41-6227510
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1978

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF OF AMICUS CURIAE

The Securities Industry Association, through its Public Finance Division, respectfully submits this brief in response to the brief filed by appellees, The State of New Jersey, et al., and in further support of the appeal to this Court by appellant United States Trust Company of New York. Counsel for appellant and counsel for appellees have consented to the filing of a reply brief by the Securities Industry Association as *amicus curiae.*

ARGUMENT

I

The 1962 Covenant Was a Relied Upon and Bargained For Part of the Bond Contract Between Bondholders and the Port Authority.

The 1962 Covenant provided in unequivocal terms that:

> "The 2 states covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, . . . neither the states nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth." (A 10-11)[1]

There can be no doubt that, from the time of the enactment of the Covenant in 1962 until its retroactive repeal in 1974, purchasers of Consolidated Bonds of The Port Authority of New York and New Jersey ("Port Authority") relied upon the Covenant as an integral part of their bond contract with the Port Authority—as a protection against the addition of deficit mass transit facilities into the Port Authority's credit structure and the consequent weakening of such structure.

The Covenant was described and discussed in every Official Statement of the Port Authority disseminated in connection with the offer and sale of Port Authority Consolidated Bonds ("Consolidated Bonds") since 1962.[2] Typically, the Official Statements stated in relevant part:

> "In connection with the legislation which authorized the Port Authority to assume responsibility for the Hudson Tubes system, the Port Authority had advised the Legislatures of both States that the credit of the Port Authority would be impaired by such an undertaking of an anticipated perpetual deficit facility unless the States would enter into an enforceable contract with the Port Authority bondholders which would grant assurances against dilution of already pledged revenues and reserves by any additional passenger rail deficits beyond those of the basic Hudson Tubes system. The legislation as finally adopted includes such statutory covenants. The covenants are between the two States and with the holders of certain described 'affected' bonds which include all Consolidated Bonds including those of the present offering. The contract prohibits the application of any revenues or reserves pledged to such bonds * * * for any additional passenger railroad purpose beyond the basic Hudson Tubes, as defined, without the consent of the holders of such affected bonds as provided in their contract with the Authority unless the Port Authority shall have first certified the eligibility of such additional railroad, whether it be a Hudson Tubes extension, as defined, or new railroad facility. To be eligible the Port

1. "A" references are to the Appendix submitted to this Court.

2. An Official Statement is used in offerings of municipal securities for the same purposes as prospectuses are used in offerings of corporate securities, *i.e.*, to induce the purchase of securities by those prospective purchasers who read the offering material. Although offerings of municipal securities are not subject to the registration requirements of the federal securities laws, such offerings are subject to the anti-fraud provision of such laws. Such Official Statements should "accurately reflect all material facts which a prudent investor should know in order to evaluate the offering before reaching an investment decision." *In the Matters of Walston Co., Inc., and Harrington*, Securities Exchange Act Release No. 8165 (1967) CCH Fed. Sec. L. ¶77,474. It is beyond peradventure that the description of the Covenant was an important inducement to prospective purchasers necessary for them to know in order to evaluate the offering before reaching an investment decision.

> Authority must determine either that the proposed additional passenger railroad facility is self-supporting or, if not, that at the end of the preceding calendar year the General Reserve Fund contained the full statutory amount and that for the ensuing ten years the estimated average annual deficits from the proposed additional passenger railroad facility and any then existing Port Authority passenger railroad facility (including the basic Hudson Tubes) would not in the aggregate exceed an amount equal to one-tenth of the amount in the General Reserve Fund at the prior year end. • • • Section 6 of the 1962 legislation (see Appendix III) should be studied for the exact terms of the statutory covenant." (A 17)

The Superior Court itself acknowledged that investors relied on the 1962 Covenant in purchasing Consolidated Bonds:

> "Based upon the testimony offered by plaintiff, the investment community's understanding of the covenant was that it in some manner furnished 'security for the bondholders and it protected the diversion of the earnings of the Port Authority into deficit mass rail transit.' If the covenant is to be understood in that sense, the record supports plaintiff's claim that investors relied on the covenant in purchasing Authority bonds." (A 110)

Although the Superior Court conceded such reliance it concluded that "while reliance existed" the Covenant was not the "primary consideration" for the purchases because

> "no witness testified that purchases would *not* have been made without the covenant, but only that they would not have purchased or recommended the purchase of the bonds 'at the price which they were then offered.'" (A 110)[3]

3. It is hard to understand how the Superior Court could have reached this conclusion after having only a few pages earlier in its opinion noted that "the interest rate fixed when [revenue] bonds are initially marketed, as well as the price of the bonds in the secondary market, will normally reflect the investor's evaluation of the underlying security of his investment. . . ." (A 108)

This conclusion by the Superior Court, more than anything else, dramatizes the basic error in the Court's reasoning. The conclusion is not consistent with the realities of the credit markets. As the gravity or number of risks related to a security increases the interest rate required to induce the purchase of such security must be raised. It may be that the security would not be purchased at any rate because the risks are just too great, but such a state of facts hardly ever exists. In any event, the types of prospective purchasers of any security change as risks and rates change because some purchasers are rate oriented and some are risk oriented. Thus, the Superior Court failed to understand the nature of debt offerings. Such securities are offered (with known or potential risk factors) at a particular price and interest rate; based on such risk factors and such interest rates, the prospective purchasers then decide either to purchase or not to purchase the security at the stated purchase price. If one ingredient of one equation is changed, the others naturally will change. It follows that the Consolidated Bonds would not have been purchased at the rates and prices incident to the original transactions but for the existence of the Covenant; and appellants witnesses so testified.[4]

Thus, there can be no doubt that the Covenant was a "bargained for" element of the bond contract into which

4. In their brief appellees state that the "appellant's claim that the price purchasers were willing to pay for bonds was affected by the covenant is unsupported by the record and immaterial as a matter of law." Appellees' Brief 89 (hereinafter cited as "App. Br."). However, no support is given for such statement, and only two pages later appellees try to suggest that strong testimony of the appellant's witnesses on this point was hypothetical. App. Br. 91. In fact each of the witnesses who testified with respect to such matters clearly testified that he would not have purchased the bonds at the prices paid without the existence of the Covenant. (A 873, 1105). Mr. Gordon Fowler, for example, whom appellees incorrectly quote, App. Br. 16, testified: "I can't say for certain we would not have purchased them, but if we had, if would have been at a much lower price for the given coupons". (A 1105)

private purchasers entered—in the sense that investors would not have purchased Consolidated Bonds at the same rates in the absence of the Covenant. The Covenant was that part of the bond contract wherein purchasers contracted against the economic fear, if not the economic certainty, that further Port Authority involvement in deficit mass transit would diminish the amount of security available to pay their bonds, either immediately or in the long run. Indeed, the *express* purpose of the Covenant was to preclude the *possibility* of the diminution of security by reason of the financing of deficit rail mass transit.

That the 1962 Covenant was enacted for the specific purpose of *inducing* investors to continue to purchase bonds of the Port Authority is beyond question and was acknowledged by the Superior Court:

> "'[T]he fact of the matter is that the Legislature of 1962 concluded it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority.'" (A 109)

Thus, the instant case is unlike the situation in *El Paso* v. *Simmons,* 379 U.S. 497, 514 (1965), in that Port Authority bondholders *were* "substantially induced to enter into these contracts" on the basis of the 1962 Covenant.

Indeed, it would be difficult to conceive of a Contract Clause case that has as little to do with the question of the constitutionality of a sovereign's attempt to repudiate its solemn promise made to induce bondholders to lend it money than the *El Paso* case. In *El Paso,* the party objecting to the state legislation was a rank *speculator* who lacked whatsoever any *bargained-for* contractual claim worthy of protection; he was also, at the time of suit, in possession of an interest in a piece of land that had been forfeited to the state more than five years previous on

account of a *default* in interest payments. This Court was not unaware of the tenuous thread on which plaintiff's claim dangled:

> "We, like the Court in *Faitoute Iron & Steel Co.* v. *City of Asbury Park,* 316 U.S. 502, 514, believe that '[t]he Constitution is intended to preserve practical and substantial rights, *not to maintain theories.*'" • • •
>
> • • •
>
> "The five-year limitation allows *defaulting* purchasers with a *bona fide* interest in their lands a reasonable time to reinstate. It does not and need not allow *defaulting* purchasers with a *speculative* interest in the discovery of minerals to remain in *endless default* while retaining a cloud on title." 379 U.S. at 515 (emphasis added).

Clearly, the doctrinal considerations employed by this Court in *El Paso* to defeat the claim of a defaulting speculator have absolutely no bearing under the facts of this case where the legitimate contractual rights of non-defaulting bondholders are at stake.

El Paso is obviously not a case for all seasons. It is a decision grounded on a narrow and unique fact pattern and should not be applied indiscriminately to deprive bondholders of their constitutionally-protected contract rights. Appellees' contention to the contrary only betrays the weakness of their case.

II.

The Covenant Provided A Substantial Protection to Port Authority Bondholders.

Investor concern in 1962 over the proposed Port Authority takeover of a perpetual deficit rail mass transit facility was well founded. In 1962, when the Port Authority was asked to assume ownership and operation of the Hudson & Manhattan Railroad ("H & M"), (now PATH), the deficit for

such operation was expected to be about $5,000,000 per year initially (A 630), and to level off at approximately $6,575,000 per year during the years 1969 through 1991 (A 677).[5] Even if those projections had been accurate, which they were not, the anticipated losses were astronomically higher than those of any other Port Authority deficit facility. Thus, as of December 31, 1960 the Port Authority's largest deficit facility (Newark Airport) incurred an annual loss of only $527,000 (A 691). PATH's present annual losses are more than five times the anticipated amount, and dwarf the operating losses of the few other Port Authority facilities which operate at a deficit. For example, in 1973 PATH's operating deficit was approximately $18,000,000 (its total deficit for 1973 was almost $25,000,000 including debt service), whereas the combined annual net operating losses of the other three deficit facilities of the Port Authority in 1973 totalled a mere $1,009,000 (A 737).[6] To put the matter in further perspective, to date Port Authority losses attri-

5. At A 677, the excerpt from the Stipulation among counsel dated December 20, 1974 refers to pages 201-209 of said Stipulation, the entire text of which is contained in Volume IV of the Joint Appendix (cited as "Ja") submitted to the Supreme Court of New Jersey. It is stated on page 209 of said Stipulation that:

> "The Commissioners' 1962 certification made with respect to the acquisition of the PATH System was made on the basis of an opinion of A. Gerdes Kuhbach, the Director of Finance of the Port Authority, which was prepared at the request of the Commissioners. His opinion analyzed and reviewed the financial aspects and data relating to the proposed acquisition, rehabilitation and operation of the PATH System. He concluded that the Section 7 certification could be made since the anticipated net loss after debt service for the years 1969 through 1991 would level off at approximately $6,575,000 per year, an amount that would not impair the sound credit rating of the Port Authority."

6. Appellees erroneously state that in 1973, 14 of the 22 facilities operated by the Port Authority were operated at a deficit. App. Br. 34, n. 22. As is clear from the table at A 737, only three of such facilities, other than PATH, operated at a deficit; one of which had an annual deficit of only $1,000.

buted to the takeover and operation of PATH total, conservatively, over $125,000,000 (A 681).

Moreover, the PATH deficits were not only expected to be staggering, but perpetutal. This reversal of the Port Authority's long-standing policy of operating only those facilities which it could reasonably expect would eventually become self-supporting exacerbated investor concern. As was testified to by appellant's witness John F. Thompson, Vice President of W. H. Morton & Co.:

> "[M]y reaction to the Port Authority getting into that [the Hudson and Manhattan] or other mass transit was one of concern because the Port Authority has always gone into projects which it could reasonably ascertain that they would become self-supporting, at least within a period of a few years of development and this seemed to be a different tact [sic] for the Port Authority to start on." (A 855)[7]

Appellees contend that repeal of the 1962 Covenant deprived bondholders of an interest of little or no value. App. Br. 92-95. Of course, appellees undermine this contention

7. Appellees state that Mr. Thompson was either "thoroughly misinformed" or "ignorant" of the Port Authority's history of successfully carrying deficit facilities. App. Br. 33-34, 35. This argument is both unfounded and misses the point. Mr. Thompson testified that the Port Authority had always undertaken projects which it *expected* would *eventually* become self-supporting (see A 959), and this statement is in no way rendered inaccurate by the fact that certain facilities did not become self-supporting as soon as expected. In marked contrast, the H & M was never expected to become self-supporting, it was an acknowledged perpetual deficit facility. Moreover, it is preposterous for appellees to attempt to compare the huge annual deficits of the H & M and other rail mass transit operations to the deficits of those few facilities of the Port Authority which operated at a deficit for a period of time. The annual deficits of these few facilities were marginal and when compared to H & M deficits were infinitesimal. (See A 737, 691). The point is that a single rail mass transit project, with its staggering and perpetual deficits, affects the Port Authority's credit structure in a significant manner, whereas the minor operating deficits of other Port Authority projects, which have taken somewhat longer than expected to become self-supporting, do not affect the Port Authority's credit structure.

themselves by acknowledging that only by repeal of the Covenant can many millions of dollars be diverted to rail mass transit. App. Br. 60. Moreover, the argument that the 1962 Covenant gave investors no additional protection is patently absurd and ignores the basic characteristics of rail mass transit deficits—they are staggering, perpetual and incapable of accurate projection. Neither the Section 7 certification, the 1.3 test nor Section 12(f), individually or taken together, gives the bondholders the protection afforded by the 1962 Covenant.

In 1962, the Port Authority Commissioners were able to issue a certification under Section 7 that the takeover of the H & M would not "materially impair the sound credit standing of the Authority or the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments" because of the projection that its net loss after debt service for the years 1969 through 1991 would level off at approximately $6,575,000 per year (A 677; see note 5, page 8, *supra*). That prediction was woefully inaccurate. Annual net operating deficits for PATH have now increased to over $30,000,000 per year. So much for the protection afforded by the Section 7 certification.

As to the 1.3 test, Daniel B. Goldberg, General Solicitor of the Port Authority, has noted (in a statement quoted by appellees, App. Br. 28) that "the 1.3 status is not prosperity to us; it is practically the point of enforced stagnation. It is the point at which our ability to finance any future projects, even any capital improvements of existing facilities, ceases." (A 836) So much for the protection afforded by the 1.3 test.

The Port Authority's experience with PATH can easily be repeated now that the 1962 Covenant has been repealed. The Port Authority will be free to take on or build another rail mass transit facility by having the Commissioners make a Section 7 certification based on *projected* deficits which will inevitably turn out to be a fraction of the actual deficits. The 1.3 test, even if met, would do no more than insure

investors that at best the Port Authority would be at a point of enforced stagnation.

As to Section 12(f)—which requires the Port Authority to establish and collect tolls, flight fees and other charges so as to generate sufficient revenue to provide for debt service upon all Consolidated Bonds—appellees state: "To take over or build a facility that would impose deficits so large that increases in tolls and charges could not carry them would violate Section 12(f). . . ." App. Br. 25. This argument is, at best, naive. If the Port Authority takes over or builds another rail mass transit facility whose deficits eventually grow to more than five times the projected amounts (as with PATH), it will be realized only in hindsight that Section 12(f), as well as Section 7, and possibly even the 1.3 test, were violated. After the fact recriminations and apologies will afford Port Authority bondholders little solace and no protection.

The indisputable fact is that in 1962 bondholders required protection in addition to that afforded by Section 7, the 1.3 test and Section 12(f) in view of the Port Authority's proposed takeover of the H & M. Investors realized that the day could come when the Port Authority fell on hard times, such as during the Depression when its toll revenues were inadequate (A 820), and in such a situation might not be able to carry two or more rail mass transit deficit operations with operating losses running into forty, fifty or sixty million dollars per year. The bondholders required assurances against such an eventuality and New Jersey and New York gave them that assurance—a solemn pledge in the form of the 1962 Covenant—in order to enable the Port Authority to take over the H & M.

Today, having abrogated that solemn pledge appellees argue that bondholders did not actually seek the protection of the Covenant and that the Covenant was really not very important. It is clear from the foregoing, however, that the Covenant was and continues to be an important protection to bondholders. In any event, appellees are asking this Court to second guess the 1962 legislature which deter-

mined that the Covenant was essential in order to continue to sell Consolidated Bonds and have the Port Authority take over the H & M—both goals being vital to the two states.

III.

Repeal of the Covenant Was an Egregious Impairment of Contract.

Appellees have failed to respond to the principal argument made by *amicus, to wit,* that New Jersey abrogated a covenant which its legislature had enacted for the specific purpose of inducing investors to purchase bonds of one of its corporate instrumentalities. That fact distinguishes this case from all other impairment cases which have come before this Court. Appellees do not attempt to refute this point simply because they could not do so. This Court has never before been asked to decide a case where the impairment of a contract was so egregious, *i.e.*, a breach of a promise which was specifically made to induce the purchase of securities where such purchase would not have been made but for that promise.[8] In this case, after the legislation had served its purpose as an inducement to purchase bonds and such bonds had been purchased, the legislation was repealed.

Appellees' attempt to draw a parallel between the instant situation and the situation facing bondholders of the Massachusetts Port Authority is patently absurd.

Appellees state:

> "Although the precedents holding all contracts, including those of the State, subject to the police power are indelibly clear, see pp. 65-75, *supra,* appellant, and *amicus* S.I.A. even more hysterically, claim that the consequences of applying this rule will be catastrophic. See, *e.g.,* Amicus Brief 4: 'A holding

8. See n. 4, page 5, *supra.*

> that the repeal legislation is valid would severely limit, if not foreclose, the access of municipal borrowers to the capital market. . . .' The claim is overwhelmingly refuted by the record.
>
> "The heart of appellant's contention is the assertion that the municipal bond market could not function if promises underlying bonds are subject to the reasonable exercise of the police power. The short answer is that it has always functioned this way."
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> • • •
>
> "The Massachusetts Port Authority was born with an express judicial declaration that the provisions in its enabling act could be altered by subsequent legislation. See *Opinion of the Justices,* p. 75, *supra.*
>
> "On two subsequent occasions this reserved power was used and its use sustained over the objection that the changes would disadvantage bondholders.
>
> • • •
>
> "Despite this history of change and continuing vulnerability to change, Massachusetts Port Authority bonds are held in high regard by the investment community." App. Br. 77, 78, 79.

The obvious flaw in this argument is that unlike the situation here the Massachusetts legislature did not enact a specific piece of legislation for the acknowledged purpose of inducing investors to purchase bonds of the Massachusetts Port Authority, and then, after investors had purchased over a billion dollars of such bonds in reliance on the legislation, retroactively repeal it in order to do precisely that which was forbidden by the legislation.

In addition, appellees have either misread or misunderstood the decisions of the Supreme Judicial Court of Massachusetts which they cite. Although appellees state that the Massachusetts Port Authority "was born with an express judicial declaration that the provisions in its enabling act could be altered by subsequent legislation", App. Br.

77-78, citing *Opinion of the Justices,* 334 Mass. 721, 136 N.E.2d 223 (1956), in that case the Justices stated that the question of whether the state's subsequent alteration of the enabling legislation would violate the Contract Clause "is not susceptible of a very satisfactory answer without knowledge of what the 'subsequent legislation' might be." (136 N.E.2d at 236). The Justices continued:

> "In a general way we would answer the question 'No.' *** We are not, however, prepared to say that there could be no subsequent legislation of the types mentioned in the question that would in some manner constitute a violation of section 10 of art. 1 of the Constitution of the United States." (*Ibid.*)

The case of *Massachusetts Port Authority* v. *Treasurer & Receiver General,* 352 Mass. 755, 227 N.E.2d 902 (1967) is also inapposite since it deals solely with an "increase to some extent" of the annual operating expenses resulting from a change in the amount of credit for prior service of employees for retirement benefit purposes. The Justices said that such increase would not affect the security behind the bonds. It is clear from the decision that the number of employees involved and the amount of money involved was *de minimus,* thus fully supporting the Justices' decision.

The last authority cited by appellees, *Opinion of the Justices,* 313 N.E.2d 882 (Mass. 1974), is actually contrary to the arguments they urge to this Court. In that opinion, the Justices upheld the constitutionality of an amendment to the Massachusetts Port Authority's enabling legislation which limited the immunity from local property taxes previously conferred on its lessees. Unfortunately, appellees ignore the reasoning employed by that Court in reaching its conclusion:

> (a) the property tax exemption of the Authority's lessees contained in the enabling act (§ 17) *was neither an express nor implied term of the Authority's contract with its bondholders;*

> (b) § 17 could not be construed "as authorizing the Authority to enter contracts which would effectively abrogate the Legislature's reserved taxing power as to the Authority and the property it owns"; and
>
> (c) "purchasers of the Authority's bonds could [not] justifiably have relied on the continuation in perpetuity of the tax exemptions provided in the enabling act." 313 N.E.2d at 888.

Indeed, the Justices noted that "it is true that 'the sovereign power . . . may in certain conditions for the public welfare' enter into, or authorize a political subdivision to enter into, a binding contract of tax exemption which would be protected from repeal by the contracts clause. [citations omitted]." 313 N.E.2d at 888-889.

Finally—in language which dramatically points up the difference between the Massachusetts Port Authority situation and the repeal of the 1962 Covenant which was an express provision of the bondholders' contract—the Justices held:

> "To be distinguished is the Opinion of the Justices, 356 Mass. 775, 250 N.E.2d 547 (1969), in which we declared unconstitutional on contracts clause grounds a bill which would have barred the Massachusetts Turnpike Authority (Turnpike Authority) for a specified period of years from increasing the tolls charged for use of the Sumner and Callahan tunnels. See also Opinion of the Justices, 190 Mass. 605, 77 N.E. 1038 (1906). The Turnpike Authority had issued bonds which were secured by the revenues received from the tunnels. *The trust agreement securing the bonds expressly incorporated the provision of the Turnpike Authority's enabling act* that required tunnel tolls to be adjusted to ensure revenues sufficient to meet the bond obligations. 356 Mass. at 793, 250 N.E.2d 547 (1969). By the enabling act the bondholders were given a judicial remedy to compel the Turnpike Authority to perform its duties, 'including the fixing, charging and collecting of tolls.' St.1958,

c. 598, § 13. Thus, to permit the Legislature subsequently to forbid the adjustment of tunnel tolls '*would be a direct legislative repudiation of an arrangement which the 1958 statute empowered the Authority to make, going to the essence of the bond contract and materially reducing the attractiveness of the revenue security.*' 356 Mass. at 794, 250 N.E.2d at 557 (1969).

"As to the questions now before us, *no express provision of the bondholders' contract would be affected by House No. 5541, nor is there any legislatively authorized "arrangement"* of permanent tax exemption which would be repudiated by that bill." 313 N.E.2d at 890 (emphasis added.)

Actually, the Massachusetts decisions cited demonstrate that the Supreme Judicial Court of Massachusetts would have struck down an attempt by the Massachusetts' legislature to cynically repudiate a solemn pledge it had made to bondholders as an integral part of the contractual bargain.

IV

No Emergency Existed Sufficient to Justify the Impairment of the Covenant With Bondholders.

Home Building & Loan Ass'n v. *Blaisdell,* 290 U.S. 398 (1934) and its progeny firmly establish that impairment of a contract may be justified only if *essential* to solve an immediate *emergency.* Yet, appellees argue that impairment may be justified even if there is no emergency ("This Court's precedents also reject the contention that use of the police power must be based on emergencies or declarations thereof." App. Br. 82), and that an impairment can be justified merely if it serves a public purpose. ("The central question asks whether a valid public interest is being served." App. Br. 84).

The opinion in *Blaisdell,* and the facts upon which it was based, leave no doubt that the contract impairment there

was justified only in order to avert the imminent disaster caused by the emergency of the Depression. There was no contrived emergency in *Blaisdell.* In that case counsel for Mr. and Mrs. Blaisdell in the *Brief for the Appellees* filed in this Court stated: "We concede that in normal times and under normal conditions the Minnesota Mortgage Moratorium Law would be unconstitutional." He then went on to say "But these are not normal times and these are not normal conditions" (*Brief for Appellees,* p. 4), and detailed the facts underlying the emergency in the State which had brought about the passage of the Moratorium Law.

"For several months prior to the passage of the Mortgage Moratorium Act many serious breaches of the peace occurred from time to time throughout the state, especially in the rural districts, in connection with mortgage foreclosure sales, and in many instances *these sales were interrupted and prevented by mobs of people,* otherwise peaceful and law abiding, *who had been driven to desperation by the fear of losing their homes.* In some instances mobs comprising more than a thousand people gathered together and forcibly prevented the holding of foreclosure sales. These disturbances increased in violence and in number *until the Governor of the state, in the interest of preserving the public peace and the safety of the community, was compelled to and did issue an executive order directing sheriffs to refrain from foreclosing mortgages on homes until the legislature had an opportunity to pass a relief measure to cope with the emergency.*" Brief for Appellees, p. 7 (emphasis added).[10]

In *Blaisdell* this Court expressly predicated its holding on the finding of an emergency, *e.g.,* 290 U.S. at 444, and no

10. In the New York Times on April 30, 1933 the incipient insurrection in Iowa was reported as follows:

"Because a State judge refused to pledge himself to sign no more farm mortgage foreclosures, and rebuked the petitioners for their deportment in his courtroom, he was physically pulled off the bench, slapped and shaken, and, when he con-

(Footnote continued)

case decided before or after *Blaisdell* supports appellees' argument, App. Br. 82, that states may impair contract rights under the guise of the police power even in the absence of an emergency. Certainly, the two cases cited by appellees for the proposition do not so hold. *Gelfert* v. *National City Bank,* 313 U.S. 221 (1941), involved New York legislation which altered the prior method of determining the amount of a deficiency judgment after mortgage foreclosure and sale. In upholding the legislation this Court merely held that the ability of mortgagees to obtain more than payment in full *was not protected by the Contract Clause*:

> "Mortgagees are constitutionally entitled to no more than payment in full. *Honeyman* v. *Jacobs, supra.* They cannot be heard to complain on constitutional grounds if the legislature takes steps to see to it that they get no more than that. As we have seen, equity will intervene in individual cases where it is palpably apparent that gross unfairness is imminent."
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>
> "To hold that mortgagees are entitled under the contract clause to retain the advantages of a forced sale would be to dignify into a constitutionally protected property right their chance to get more than the amount of their contracts. *Honeyman* v. *Jacobs, supra.* The contract clause does not protect such a strategical, procedural advantage."
>
> • • •

(Footnote continued)

tinued to refuse, he was taken into the country for harsher treatment. His fortitude enduring, the enraged farmer put a rope around his neck, pushed him to his knees, smeared him with grease and mockingly crowned him with a hubcap in Plymouth County, Iowa, last wrenched from a truck * * *. For more than a year the normally peaceful and patriotic State of Iowa has been the most distressful farming region in the United States, but there was high feeling elsewhere against economic conditions that repaid the farmer's toil with foreclosure on his farmstead. In the cities the population had been miserable, too, but, contrary to the experience of most other countries, the mood for violence among usually orderly citizens was showing most clearly among the farmers."

> "As stated by this Court in [*Honeyman* v. *Hanan,* 302 U.S. 375, 378] the Federal Constitution does not prevent the states from determining, on due notice and opportunity to be heard, 'by what process legal rights may be asserted or legal obligations' enforced. The principles of those cases are applicable here. The fact that an emergency was not declared to exist when this statute was passed *does not bring within the protective scope of the contract clause rights which were denied such protection in Honeyman* v. *Jacobs, supra.* See *Home Building & Loan Ass'n* v. *Blaisdell, supra.*" 313 U.S. at 233, 234, 235 (emphasis added).

In *Viex* v. *Sixth Ward Bldg. & Loan Assn. of Newark,* 310 U.S. 32 (1940), this Court merely held that *emergencies* could be met by permanent legislation as well as temporary legislation; the case certainly does not stand for the proposition that a state may impair a contract in the absence of an emergency.

> "The cases cited in the preceding paragraph make repeated reference to the emergency existing at the time of the enactment of the questioned statutes. Many of the enactments were temporary in character. We are here considering a permanent piece of legislation. So far as the contract clause is concerned, is this significant? We think not. 'Emergency does not create [constitutional] power, emergency may furnish the occasion for the exercise of power.' We think of emergencies as suddenly arising and quickly passing. The emergency of the Depression may have caused the 1932 legislation, but the weakness in the financial system brought to light by that emergency remains. If the legislature could enact the legislation as to withdrawals to protect the associations in that emergency, we see no reason why the new status should not continue. When the 1932 act was passed commercial and savings banks, insurance companies and building and loan associations were suffering heavy withdrawals. The liquid portion of their assets were being rapidly drained off

by their customers, leaving the long term investments and depreciated assets as an inadequate source for payment of the remaining liabilities. An acceleration or a continuance of this tendency to withdraw available funds threatened a quick end to the ability of the institutions to meet even normal demands. Such threatened insolvency demands legislation for its control in the same way that liquidation after insolvency does. Such legislation may be classed as emergency in one sense but it need not be temporary."

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"Certainly the protection of building and loan associations against the catastrophe of excessive withdrawal is, today, within legislative power." 310 U.S. at 39-40, 41.

Thus, in *Viex* the Court premised its holding on the imminent "catastrophe" of excessive withdrawals which would cause the demise of financial institutions of major importance to the credit system of the State.

Appellees' reason for arguing that contracts may be impaired to meet public purposes even in the absence of an emergency is obvious. Appellees recognize that the States of New Jersey and New York have not been faced with an "emergency" of a stature sufficient to justify not only the impairment of Port Authority bondholders' contracts but also the breaking of a solemn Covenant made by two sovereign governments for the purpose of inducing private investors to lend money for state purposes. Of course, appellees do not acknowledge as much; rather they make the hyperbolic argument that repeal was necessary because "physical, political [and] economic survival [was] at stake." App. Br. 96. This ludicrous exaggeration underscores the weakness of appellees' arguments. Surely, if the energy and pollution problems were true emergencies which threatened the physical, political and economic survival of New Jersey and New York, the legislatures of those

states would choose a more immediate measure than waiting for several years to improve mass transit in the narrow confines of the Port District. Indeed, they would have substantially raised gasoline taxes, automobile taxes or, given the reality of appellees' apocalyptic vision, barred automobile traffic. No such emergency measures were deemed necessary. The transit, energy and pollution problems are chronic difficulties, not emergency situations, and their causes and effects *cannot* be disposed of or handled on an emergency basis.

Moreover, even if these problems were of emergency proportion, appellees have failed to establish that repeal was *necessary* in order to avert a grave public injury or that the 1962 Covenant stood *directly* in the way of a solution to these problems. As noted in *amicus'* main brief, the common thread in all the cases in which this Court has upheld an impairment is the fact that the obligation impaired actually *directly* contributed to the emergency or *prevented* its solution. See, e.g., *Home Building & Loan Assn.* v. *Blaisdell, supra; Block* v. *Hirsch,* 256 U.S. 134 (1921); *W. B. Worthen Co.* v. *Kavanaugh,* 295 U.S. 56 (1935); *East New York Savings Bank* v. *Hahn,* 326 U.S. 230 (1945); *El Paso* v. *Simmons, supra.* Obviously, the 1962 Covenant did not directly contribute to the energy or pollution problems nor preclude a solution of these problems and appellees have not argued that it did.

Finally, it is clear that repeal of the 1962 Covenant was not, as required by *Blaisdell,* "appropriate" to meet the energy and pollution problems.[11] These problems cannot be

11. In *Blaisdell* this Court stated:

"In view of the nature of the contracts in question—mortgages of unquestionable validity—the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions." 290 U.S. at 445.

solved, or even substantially alleviated, by the building or reconstruction of a few rail mass transit systems within the narrow confines of the Port District. It is not enough to justify a contract impairment to establish that the problems will, in some small way, be alleviated by such impairment. In other words, repeal of the 1962 Covenant was "inappropriate" because it was a case of over-kill in view of the modest results which could possibly be attained. The impairment cases cited above, from *Blaisdell* to *El Paso,* which are all predicated on the fact that the impaired obligation stood directly in the way of a solution to the emergency or directly caused the emergency, are not applicable and cannot serve as precedents in the instant case. Appellees problem is compounded by the fact, noted above, that they cannot even demonstrate that the impairment caused by repeal will significantly mitigate the energy or pollution problems. Indeed, given the serious adverse effect repeal will have, and has had, on the ability of New Jersey, New York and their agencies to market their obligations, repeal is not only ineffective but counter-productive.

Of course, notwithstanding appellees' contention to the contrary, in the instant case there was no legislative declaration of an emergency or of the Covenant's relation to any emergency or of the repeal's relation to the solution of any emergency. Even if there was such declaration, however, it would not have been conclusive but would have had to have been carefully scrutinized by this Court. As was stated in *Blaisdell:*

> "In these cases of leases, it will be observed that the relief afforded was temporary and conditional; that it was sustained because of the emergency due to scarcity of housing; and that provision was made for reasonable compensation to the landlord during the period he was prevented from regaining possession. The Court also decided that while the declaration by the legislature as to the existence of the emergency

> was entitled to great respect, it was not conclusive; and, further, that a law 'depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.' It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends. *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543, 547, 548." 290 U.S. at 441-442.

Indeed, in a situation where the legislature is repudiating its own solemn pledge the normal deference given to legislative judgments should be reversed. Given their conflicting roles as both repudiating borrowers and judges in their own case, appellees should not be afforded the usual deference which is given to legislative determinations of public policy—which is founded on the recognition that, as a rule, a legislature occupies an impartial position, enabling it to mediate fairly between various interests.

In sum, no case has upheld the impairment of an obligation of contract in a non-emergency situation. Nor has any case upheld an impairment in an emergency situation unless (1) the impairment would significantly contribute to the solution of the emergency and, indeed, (2) was the *only* means of solving the emergency. These basic requirements are essential to the maintenance of continued confidence in the inviolability of contracts. After *Blaisdell,* for example, there was no reason for mortgagees to lose confidence in their mortgage contracts; they realized that their contracts would be enforced in the absence of a clear emergency. If the repeal of the 1962 Covenant is upheld, however, investors will have good reason to lose confidence in the integrity of their municipal bond contracts. The repercussions of this will obviously redound against the public interest.

Conclusion

The retroactive repeal of the 1962 Covenant was a politically motivated repudiation of a solemn pledge which should not be sanctioned by this Court.

Respectfully submitted,

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